Supreme Court, U.S.
FILED
JAN - 5 2006
OFFICE OF THE CLERK

No. 05-865

In The

Supreme Court of the United States

PACIFIC ROCK CORPORATION,

Petitioner,

v.

LOURDES M. PEREZ, in her official capacity as Director of Administration, Government of Guam,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Guam

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The sovereign immunity of the Government of Guam, an unincorporated territory and instrumentality of the United States, is derivative from that of the federal government, and is recognized by federal law both through an act of Congress and under federal common law. The question presented in this case is whether this Court should exercise its supervisory authority and grant certiorari to resolve a conflict among several circuit courts and the court of last resort of the territory of Guam over the federal question of whether sovereign immunity creates an exception to the final judgment rule of *res judicata*?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties are as stated in the caption, with the Government of Guam being the real party-in-interest for defendant.

Pacific Rock Corporation is a non-governmental corporation. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Pacific Rock Corporation v. Lourdes M. Perez, in her official capacity as Director of Administration, Government of Guam, 2005 Guam 15, 2005 WL 2738328 (Guam Terr. 2005) (Supreme Court of Guam, 2005). *App. 1.*

BASIS FOR SUPREME COURT JURISDICTION

The Supreme Court of Guam entered its judgment on October 12, 2005. *App. 21.* Petitioner Pacific Rock Corporation ("Pacific Rock") seeks review of that judgment on a writ of certiorari. The petition is timely filed under 28 U.S.C. §2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. §1257 and 48 U.S.C. §1424-2 to review on a writ of certiorari the judgment of the Supreme Court of Guam.

STATUTES INVOLVED IN THE CASE

48 U.S.C. §1421a. Unincorporated Territory – Government. Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The Government of Guam shall have the powers set forth in this Act, shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the

> Government of Guam of any of its lawful powers. The Government of Guam shall consist of three branches, executive, legislature and judicial, and its relations with the Federal Government in all matters not the program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of Interior.

STATEMENT OF THE CASE

In November of 1994, Pacific Rock filed suit in the Superior Court of Guam against Guam's Department of Education, a line agency of the Government of Guam ("DOE") for the amount of the unpaid balance it claimed DOE owed for the construction of several temporary classrooms. After a trial on the merits, the trial court awarded Pacific Rock $514,258.76, plus pre-judgment and post-judgment interest. DOE appealed. *App. 2-3 ¶ 2.*

On appeal ("*Pacific Rock I*"), DOE challenged the trial court's decision on several grounds, but did not challenge the trial court's award of post-judgment interest to Pacific Rock on sovereign immunity grounds. Thus, the issue of sovereign immunity was not addressed in *Pacific Rock I.* The Supreme Court of Guam reversed the judgment of the trial court (*Pacific Rock v. Department of Educ.*, 2000 Guam 19, 2000 WL 979988 (Guam Terr. 2000). Pacific Rock then petitioned for rehearing of *Pacific Rock I. App. 3 ¶ 4.*

In opposition to Pacific Rock's Petition for Rehearing, DOE again did not raise the issue of sovereign immunity with respect to the post-judgment interest awarded to Pacific Rock by the trial court. After granting the Petition

for Rehearing, the Supreme Court of Guam reversed itself and affirmed the judgment of the trial court. See *Pacific Rock v. Dept. of Educ.*, 2001 Guam 21, 2001 WL 1360155 (Guam Terr. 2001) (*"Pacific Rock II"*). *App. 35-68.* The Supreme Court of Guam then issued its mandate to the trial court affirming the trial court's decision. *App. 71.*

A few hours after the Supreme Court of Guam issued its opinion in *Pacific Rock II* affirming the trial court's judgment, the Supreme Court of Guam issued its opinion in *Sumitomo Construction v. Government of Guam*, 2001 Guam 23, 2001 WL 1360165 (Guam Terr. 2001) where it was held that post-judgment interest cannot be awarded against the Government of Guam because the legislature did not waive its sovereign immunity with respect to post-judgment interest. DOE, upon losing its appeal in *Pacific Rock II*, petitioned the Supreme Court of Guam for rehearing, but again did not challenge the trial court's decision awarding post-judgment interest to Pacific Rock. The Supreme Court of Guam denied DOE's petition for rehearing. *App. 4 ¶ 6.*

On January 22, 2003, Pacific Rock filed a Petition for Alternative Writ of Mandate which sought payment of the judgment out of the Government of Guam's "Claims Fund". On the same day, the trial court issued the Alternative Writ of Mandate, commanding Lourdes Perez, in her official capacity as the Director of Administration of the Government of Guam, to pay the judgment out of the Government Claims Fund, or show cause why she had not. *App. 5-6 ¶ 11.*

At this point the defendant first raised the defense of sovereign immunity for the post-judgment interest, based on *Sumitomo.* However, in light of the mandate from the

Supreme Court of Guam affirming the trial court's earlier decision, the trial court issued its Decision and Order on January 29, 2003, holding, *inter alia*, that the award of post-judgment interest at the rate of 6% to Pacific Rock against DOE was valid. *Disision Yan Otden, App. 23-34.*

On March 28, 2003, the trial court issued a Judgment on the writ in favor of Pacific Rock. *App. 69.*

The Guam Attorney General appealed the judgment to the Supreme Court of Guam, collaterally attacking the judgment of *Pacific Rock II* on the grounds that the Government of Guam's sovereign immunity precluded judgment for post-judgment interest (the "Writ Case"). The decision of the Supreme Court of Guam on that issue is the subject of this petition for review. See *Pacific Rock v. Lourdes M. Perez, in her official capacity as the Director of Administration, Government of Guam*, 2005 Guam 15, 2005 WL 2738328 (Guam Terr. 2005). *App. 1-19.*

The main issue on the appeal was "whether sovereign immunity will lie as an exception to the general rule of *res judicata*." *App. 9-10 ¶ 23.* The Supreme Court of Guam found that *res judicata* applied because "[a]n official-capacity suit is really just another way of suing the government", quoting *Conner v. Reinhard*, 847 F.2d 384, 394 (7th Cir. (Wis.) 1998). *App. 8-9 ¶ 22.* But as to whether sovereign immunity is an *exception* to application of the *res judicata*, the court acknowledged that the federal courts have "ruled either way". *App. 11 ¶ 25.* On one hand are cases holding that a sovereign who fails to invoke its immunity while the litigation is pending cannot do so after the lawsuit has ended or foreclosed by the decree; e.g., *City of South Pasadena v. Mineta*, 284 F.3d 1154 (9th Cir. (Cal.) 2002), 52 Fed.R.Serv.3d 294; (citing *Gunter v. Atlantic*

Coast Line R. Co., 200 U.S. 273, 26 S. Ct. 252, 50 L.Ed. 477 (U.S.S.C. 1906)). *App. 11-12 ¶ 25.*

On the other hand are the holdings that in special circumstances sovereign immunity can trump the application of *res judicata*; e.g., *U.S. v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 60 S. Ct. 653, 84 L.Ed. 894 (U.S. Okla. 1940) (involving federal sovereign immunity) and *Jordon v. Gilligan*, 500 F.2d 701, 18 Fed.R.Serv.2d 1280 (6th Cir. (Ohio) 1974), *cert. den.*, 421 U.S. 991, 95 S. Ct. 1996, 44 L.Ed.2d 481 (U.S. Ohio 1975) (involving state government immunity).

Pacific Rock, however, relied primarily on a Seventh Circuit case addressing the very arguments the government was making on appeal, *U.S. v. County of Cook, Ill.*, 167 F.3d 381 (7th Cir. (Ill.) 1999), *cert. den.*, 528 U.S. 1019, 120 S. Ct. 527, 145 L.Ed.2d 408 (1999). *Cook*, a case closely on point with the present action, held that the United States Government could not assert its sovereign immunity against a judgment for taxes, interest, and penalties imposed in a case that had reached final judgment (citing *U.S. v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S. Ct. 575, 78 L.Ed.2d 388 (U.S. Tenn. 1984); *Nevada v. U.S.*, 463 U.S. 110, 103 S. Ct. 2906, 77 L.Ed.2d 509 (U.S. Nev. 1983), and distinguishing *U.S. v. USF&G., supra*).

The Guam Supreme Court, however, rejected the analysis employed by the Seventh Circuit in *County of Cook* and held that the doctrine of sovereign immunity was unwaivable under federal law without legislative consent, that the Supreme Court of Guam lacked subject matter jurisdiction to award post-judgment interest in *Pacific Rock II*. Judgment was therefore issued reversing the award of post-judgment interest (*App. 20*), which was

entered on October 12, 2005 (*App. 21*). This petition was timely filed pursuant to U.S. Supreme Court Rule 13.

REASONS FOR GRANTING THE PETITION

Review by this Court of the decision of the court of last resort of the Territory of Guam on an important federal question is necessary to insure the uniform application of competing doctrines of the sovereign immunity of the United States and its instrumentalities and *res judicata*. The circuit courts have been split on this issue, and the Guam decision conflicts with relevant decisions of this Court. The time is ripe for this Court to resolve this confusion.

I. A FEDERAL QUESTION

At the outset it should be noted that federal courts have repeatedly recognized that because Guam is an unincorporated territory it enjoys only such powers as may be delegated to it by the U.S. Congress; that the Government of Guam is in essence an *instrumentality* of the federal government, subject to the plenary power of Congress. *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), *cert. den.*, 475 U.S. 1081, 106 S. Ct. 1457, 89 L.Ed.2d 715 (U.S. Guam 1986) (relying on *U.S. v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079, 55 L.Ed.2d 303 (U.S. Ariz. 1978)); *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1371-72 (9th Cir. 1988), *aff'd*, 495 U.S. 182, 110 S. Ct. 1737, 109 L.Ed.2d 163 (U.S. Guam 1990).

The Government of Guam derives its sovereign immunity from federal law, both statutorily through

Guam's Organic Act (48 U.S.C. §1421a) and as recognized under federal common law (*Kawananakoa v. Polyblank*, 205 U.S. 349, 27 S. Ct. 526, 51 L.Ed. 834 (U.S. Hawai'i 1907)); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 58 S. Ct. 167, 82 L.Ed. 235 (U.S. Puerto Rico 1937); *People of Porto Rico v. Rosaly Castillo*, 227 U.S. 270, 33 S. Ct. 352, 57 L.Ed. 507 (U.S. Puerto Rico 1913)).

As between Guam and the United States, there are not two separate sovereigns in any meaningful sense, but only one system of government. *U.S. v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079, 55 L.Ed.2d 303 (U.S. Ariz. 1978). "Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty." *People of Puerto Rico v. Shell Co.*, *supra*, 302 U.S. at 264. Thus it can be said that Guam's sovereign immunity is derivative from that of the United States.

In this case the Guam Supreme Court ruled that such sovereign immunity is so pervasive as to be an exception to the general rule of *res judicata*. In doing so the Guam Supreme Court was not interpreting local statutes on a matter of mere local concern, as it did in *Pacific Rock I* and *Pacific Rock II*. Instead, this was a federal question, and it looked to federal law and found there is a conflict among the circuit courts, and its decision to align with the minority puts Guam's holding in conflict with six other circuit courts of appeal.

II. CONFLICT IN THE CIRCUITS

The principle disagreement is over the application of this Court's holding in *U.S. v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 60 S. Ct. 653, 84 L.Ed. 894 (U.S. Okla. 1940)

(*"USF&G"*), the case relied upon by the defendant herein. In that case the United States, as Trustee for the Choctaw and Chickasaw Nations, filed a claim for $2,000 in the bankruptcy of Central Coal & Coke Co. The coal company responded with a cross-claim for approximately $11,000, which the United States ignored because claims against Indian tribes had to be filed in a "United States Court in the Indian Territory", a category to which the bankruptcy court did not belong. In other words, the cross-claim had been filed in the wrong court, a court which lacked subject matter jurisdiction. Nonetheless the referee in bankruptcy allowed the coal company's claim, leaving a judgment against the Tribes in the net amount of $9,000. When the coal company attempted to enforce this judgment, the United States resisted on sovereign immunity grounds. This Court allowed the defense, stating that "[t]he sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts, not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent." *USF&G, supra*, at 513. This Court went on to rule that such immunity "govern[s] likewise the question of res judicata." *Id.*, at 514. Thus *USF&G* stands at least for the proposition that a sovereign may safely ignore proceedings instituted against it in the wrong court without fear that the doctrine of *res judicata* will render such judgment final against the sovereign, because such judgment is "void". *Id.*, at 512.[1]

[1] A similar result was reached in another 1940 "wrong court" case, *Kalb v. Feuerstein*, 308 U.S. 433, 60 S. Ct. 343, 84 L.Ed. 370 (U.S. Wis. 1940).

There has been scant mention of *USF&G* by this Court in the 65 years since the opinion was published, prompting a Seventh Circuit judge to comment in 1999 that "the opinion in *USF&G* vanished from the law of judgments as soon as the ink dried on volume 309 of the United States Reports." *U.S. v. County of Cook*, 167 F.3d 381, 390 (7th Cir. 1999).[2] In 2002 this Court indicated that its holding in *USF&G* should be limited to the "special circumstances" of that case. *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 122 S. Ct. 1640, 152 L.Ed.2d 806 (U.S. Ga. 2002) (listing the "special circumstance" of *USF&G* as "an effort by a sovereign (i.e., the United States) to seek the protection of its courts (i.e., the federal courts), or an effort to protect an Indian tribe."). *Id.*, at 623.

Additionally, since 1940 when *USF&G* was decided this Court on numerous occasions has issued decisions holding that in most circumstances the principles of *res judicata* prevail over untimely asserted defenses of sovereign immunity or "lack of subject matter jurisdiction". Examples are, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 709 fn. 9, 102 S. Ct. 2099, 2104 fn. 9, 72 L.Ed.2d 492, 34 Fed.R.Serv.2d 1 (U.S. Pa. 1982) ("a party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack

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[2] This statement by Circuit Judge Easterbrook is not entirely correct. In 1963 this Court made passing mention of *USF&G* as being one example of when sovereign immunity may "in some contexts" (i.e., when there are "overriding considerations" present) be an exception to the general rule of finality of "jurisdictional determinations". See *Durfee v. Duke*, 375 U.S. 106, 114, 84 S. Ct. 242, 246-247, 11 L.Ed.2d 186 (U.S. Mo. 1963).

upon an adverse judgment . . . Principles of res judicata apply to jurisdictional determinations – both subject matter and personal."); *Nevada v. U.S.*, 463 U.S. 110, 129-130, 103 S. Ct. 2906, 2918, 77 L.Ed.2d 509 (1983) ("the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . The final 'judgment puts an end to the cause of action which cannot again be brought into litigation between the parties upon any ground whatever.' ").[3]

Despite the decisions in *Insur. Corp. of Ireland and Nevada*, the Guam Supreme Court decided to apply the analysis of *USF&G* in holding that *res judicata* does not bar a sovereign from collaterally attacking the validity of a final judgment for post-judgment interest on grounds of "immunity". *App. 15 ¶ 29*. This decision is in direct conflict with the United States Court of Appeals for the Seventh Circuit in *U.S. v. County of Cook*, *supra*, a case very similar to the one at hand. In *County of Cook*, the United States government was refusing to pay interest and

[3] These holdings seemingly contradict an earlier holding by this Court that in order for jurisdictional determinations by one state to be binding in another state, the jurisdictional issue had to have been "fully and fairly litigated", not just available for argument. (*Durfee v. Duke*, 375 U.S. 106, 111, 84 S. Ct. 242, 245, 11 L.Ed.2d 186, addressing the application of the "full faith and credit" clause of the U.S. Const. Art. IV, §1). The apparent contradiction might be explained away by an undiscussed distinction between the general rule of res judicata and the application of "full faith and credit" principles.

penalties accrued on overdue real estate taxes assessed on two federal buildings in Chicago as part of a judgment in an earlier action. The United States was arguing that sovereign immunity precluded any judgment for interest and penalties. The United States had failed to raise the defense of sovereign immunity in the earlier action, but contended that although its lawyers neglected to invoke the sovereign immunity it was nevertheless entitled to a fresh adjudication on that issue, just as the Government of Guam argued here. The *Cook* court recognized "[f]or a long time it has been understood that the United States, like a private litigant, cannot relitigate claims that have reached final judgment." *Cook*, *supra*, at 385.

Like the Government of Guam did here, the United States in *Cook* argued that its lawyers cannot waive the sovereign immunity of the United States, and thus the lawyers' failure to raise the defense earlier cannot be construed as a waiver. The *Cook* court replied:

> The problem with this argument lies not in its premise but in the expression of its conclusion – for a court does not "give effect" to attorneys' arguments (or silence). It is the judgment of the court, and not of the attorneys, that has legal effect. A court with authority to consider and reject an invocation of sovereign immunity also has authority to enter judgment adverse to the interest of the United States without "waiving" (or violating) that immunity.

Id., at 387.

The decision in *Cook* on this issue is in accord with decisions from the First Circuit, Third Circuit, Ninth Circuit, Tenth Circuit, and Federal Circuit Court of Appeals. The Court of Appeals for the Third Circuit holds

that "where non-waivable subject matter jurisdiction is lacking but not raised, a final judgment has *res judicata* effect in a subsequent proceeding, and a collateral attack based on the want of subject matter jurisdiction as barred." *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware*, 12 F.3d 406, 408-409 (3rd Cir. (Del.) 1993) (a case involving state 11th Amendment sovereign immunity). *City of South Pasadena v. Mineta*, 284 F.3d 1154 (9th Cir. (Cal.) 2002) held that while objections based on subject matter jurisdiction and sovereign immunity may be raised "at any time, even on appeal", they must be raised while the lawsuit is still pending, and they may not be raised for the first time by way of a collateral challenge in a subsequent action." *Id.*, at 1157. In *U.S. v. Lots 43 through 46*, 935 F.2d 1134 (10th Cir. (Colo.) 1991), the Tenth Circuit also recognized that "jurisdictional issues are not an exception to the principles of res judicata." *Id.*, at 1138. In 2003, the Federal Circuit Court of Appeals took the position that considerations of sovereign immunity do "not justify deviation from the rule that principles of res judicata [also] apply to jurisdictional determinations," and interpreted the holding in *USF&G* to be limited to those situations where a judgment had been obtained against a sovereign in the wrong court. *International Air Response v. U.S.*, 324 F.3d 1376 (Fed.Cir. 2003). Finally, the First Circuit Court of Appeals in a case involving a collateral attack by a state against an award of final judgment for attorney's fees on grounds of 11th Amendment immunity, stated in dictum, "[n]otwithstanding the Supreme Court's decision in *U.S. v. U.S. Fidelity Co.*, 309 U.S. 506, 60 S. Ct. 653, 84 L.Ed. 894 (1940), it is unlikely today that a court's final decision would ordinarily be open to collateral attack on 11th Amendment grounds." *Garrity*

v. Sununu, 752 F.2d 727, 40 Fed.R.Serv.2d 1025 (1st Cir. (N.H.) 1984).

On the other hand, a decision from the U.S. Court of Appeals for the Sixth Circuit favors the contrary holding made by the Supreme Court of Guam in this case. In *Jordon v. Gilligan*, 500 F.2d 701, 18 Fed.R.Serv.2d 1280 (6th Cir. (Ohio) 1974), *cert. den.*, 421 U.S. 991, 95 S. Ct. 1996, 44 L.Ed.2d 481 (1975). The court held that a state's 11th Amendment sovereign immunity may be raised for the first time in a post-judgment motion under Rule 60(b) Fed.R.Civ.P. against an award of attorney's fees against the State of Ohio in a federal court, even after the state's acquiescence to the award, because Ohio had never waived its immunity from attorney's fees, and the award therefore was "void". Sovereign immunity was therefore held in the Sixth Circuit to be a general exception to the application of *res judicata* (directly in conflict with the First Circuit's *Garrity v. Sununu, supra* and Third Circuit's *Mitchell v. Delaware, supra*).

In short, this Court should grant review of this matter under sections (a), (b), and (c) of Rule 10 of the Supreme Court Rules in order to reconcile the conflicting decisions among the Sixth Circuit and the Guam Supreme Court on one hand, with the decisions of the First, Third, Seventh, Ninth, Tenth, and Federal Circuits, and recent decisions by this Court, on the other.

III. WRIGHT & MILLER ADVOCATES FOR THIS COURT'S REEXAMINATION OF *USF&G*

Lastly, Petitioner would like to point out that the recent edition of Chapter 13 of *Federal Practice & Procedure*, Wright, Miller & Cooper (Second Edition, 2002), advocates for the reexamination of this Court's decision *USF&G*. In discussing the *USF&G* decision in §4429 of that publication, the authors state:

> Apart from the Eleventh Amendment, moreover, it is difficult to find in archaic principles of sovereign immunity any kinship to the needs of legislative and constitutional control that underlie limits on subject-matter jurisdiction. The case should be treated simply as one that presented an erroneous judgment. [footnote omitted]. It remains open to argue that sovereign immunity represents such a compelling policy that it should justify disregard of res judicata. This argument may prove correct as to judgments whose enforcement would pose an honest threat to government functions. In ordinary settings, however, the asserted interests do not seem vital. It may be hoped that the principle of the Court's decision will be rejected in the future. [footnote omitted].

The footnote to the last quoted sentence states that a "good beginning" in rejecting the broad application of *USF&G* has been made in the Seventh Circuit by *U.S. v. County of Cook, supra*. In §4428 of the treatise, the authors designate as "old view" ("perhaps a bit more than a century ago") those decisions holding that a judgment entered by a court lacking subject-matter jurisdiction is "void" and not entitled to *res judicata* effect. The authors point out, "[a] lack of subject-matter jurisdiction does not

of itself depreciate any of the central values of judicial finality." *Id.* "Today, it is safe to conclude that most federal-court judgments are res judicata notwithstanding a lack of subject-matter jurisdiction." *Id.*

Thus it would appear, at least to the authors of the Wright & Miller treatise, that the decision by the Guam Supreme Court at issue here, as well as that of the Sixth Circuit, is an "old view" application of an "archaic" doctrine. Petitioner asks for this Court to agree.

CONCLUSION

Review of the Supreme Court of Guam's decision through a writ of certiorari will yield a result for these litigants and for others that conforms to the teachings of this Supreme Court and restores harmony to the Circuits on an important and far-reaching issue.

Respectfully submitted,

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January 2006

IN THE SUPREME COURT OF GUAM

PACIFIC ROCK CORPORATION,
Petitioner-Appellee,

vs.

LOURDES M. PEREZ,
in her official capacity as
Director of Administration,
Government of Guam,
Respondent-Appellant.

Supreme Court Case No.: CVA03-010
Superior Court Case No.: SP0218-02

OPINION

Cite as: 2005 Guam 15

Appeal from the Superior Court of Guam
Argued and submitted on February 20, 2004
Hagåtña, Guam

(Filed Oct. 11, 2005)

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; and ROBERT J. TORRES, Associate Justice.

CARBULLIDO, C.J.:

[1] Respondent-Appellant Lourdes M. Perez, in her official capacity as Director of Administration, Government of Guam ("the Director"), appeals from the trial court's Decision and Order and Judgment granting Petitioner-Appellee Pacific Rock Corporation's first and second petitions for writ of mandate, which ordered the Director to pay Pacific Rock postjudgment interest at the rate of 6% per annum accruing on the judgment in Superior Court Case No. CV1668-94. The Director further appeals from the trial court's holding that notes issued pursuant to section 22415 of Title 5 Guam Code Annotated ("GCA") must include interest at the rate of 7% per annum.

[2] We hold that the trial court lacked jurisdiction to award post-judgment interest to Pacific Rock against the government of Guam and therefore, the trial court erred in upholding the validity of the judgment in Superior Court Case No. CV1668-94. We further hold that the trial court properly concluded that notes issued pursuant to Title 5 GCA § 22415 must bear interest at the rate of 7%. Accordingly, we reverse in part, affirm in part, and remand to the trial court.

I.

[3] In November of 1994, Pacific Rock filed suit in the Superior Court of Guam against the Department of Education ("DOE") for the amount of the unpaid balance it claimed DOE owed for the construction of several temporary classrooms. After a trial on the merits, the trial court

awarded Pacific Rock $514,258.76, plus prejudgment and post-judgment interest.[1] DOE appealed.

[4] On appeal (*"Pacific Rock I"*), DOE challenged the trial court's decision on several grounds, but did not challenge the trial court's award of post-judgment interest to Pacific Rock on sovereign immunity grounds. Thus, the issue of sovereign immunity was not addressed by this court in *Pacific Rock I.* This court reversed the judgment of the trial court. *See Pacific Rock v. Dep't of Educ.*, 2000 Guam 19. Pacific Rock then petitioned for a rehearing of *Pacific Rock I.*

[5] In opposition to Pacific Rock's petition for rehearing, DOE again did not raise the issue of sovereign immunity with respect to the post-judgment interest awarded to Pacific Rock by the trial court. After granting the petition for rehearing, this court affirmed the judgment of the trial court. *See Pacific Rock v. Dep't of Educ.*, 2001 Guam 21 (*"Pacific Rock II"*). In the 2001 opinion, by way of background information, the court recited, but did not discuss, the trial court's award of post-judgment interest to Pacific Rock.[2]

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[1] The Director contends, and Pacific Rock does not dispute, that Pacific Rock in its complaint and amended complaint did not seek prejudgment or post-judgment interest. Neither complaint can be found in the record before us.

[2] In *Pacific Rock II*, 2001 Guam 21, ¶ 10, this court stated:

> A four-week bench trial was held on August 26, 1996 through September 23, 1996, and subsequently, the trial court ruled in favor of Pacific Rock, denying DOE liquidated damages but awarding Pacific Rock a total of $514,258.76 in damages plus prejudgment and post-judgment interest.

[6] A few hours after the court issued its opinion in *Pacific Rock II* affirming the trial court judgment, the court issued its opinion in *Sumitomo Construction Co. v. Government of Guam,* 2001 Guam 23, where we held that post-judgment interest cannot be awarded against the government because the legislature did not waive the government of Guam's sovereign immunity with respect to post-judgment interest. DOE, who ultimately lost its appeal, petitioned this court for a rehearing of *Pacific Rock II,* but again did not challenge the trial court's decision awarding post-judgment interest to Pacific Rock. This court denied DOE's petition for rehearing.

[7] On October 2, 2002, Pacific Rock filed a petition for writ of mandate in the trial court ("the Writ Case"), seeking an order directing the Director of the Department of Administration to pay Pacific Rock's judgment out of the Government Claims Fund pursuant to Title 5 GCA § 6402. Appellant's Excerpts of Record, pp. 1-3 (Petition for Writ of Mandate). The trial court issued the alternative writ on the same day, directing the Director to pay the Pacific Rock judgment out of the Government Claims Fund or show cause why it had not done so. (Appellant's Excerpts of Record, pp. 4-5 (Writ of Mandate). The show cause hearing was rescheduled and was held on January 10, 2003.

[8] Meanwhile, on December 5, 2002, Pacific Rock and the "government of Guam – including the Department of Education," entered into a settlement agreement whereby the government agreed to issue promissory notes "pursuant to 5 G.C.A. § 22415," for the principal amount of the Pacific Rock judgment, in exchange for Pacific Rock's agreement to relinquish any priority for payment that it may have had for payment out of the Government Claims

Fund. Appellant's Excerpts of Record, pp. 12-15 (Settlement Agreement). In the agreement, the parties recognized that, while the promissory notes would issue for the payment of the principal amount of the judgment, "the parties are in the process of litigating the validity of the provision for post-judgment interest . . . and the issue of whether interest on the promissory notes is required." Appellant's Excerpts of Record, p. 15, ¶ 5 (Settlement Agreement).

[9] Pursuant to Title 5 GCA § 22415, Pacific Rock then sent a letter to the Director, requesting the Director to issue two promissory notes in equal amounts of $263,301.02, one to be payable to Pacific Rock and the other to Thomas Tarpley. On October 24, 2002 and December 6, 2001, the trial court in two other unrelated cases issued a Writ of Execution against Pacific Rock, in favor of UOG for $75,220.00 and Dongbu Insurance for $43,355.50. In both cases, Pacific Rock agreed to satisfy the judgments by tendering a promissory note to each of the two judgment creditors.

[10] On December 3, 2002, the Director issued four promissory notes, as follows:

1. $263,301.02 (Thomas Tarpley)
2. $120,759.40 (UOG)
3. $61,126.70 (Dongbu Insurance)
4. $81,414.92 (Delbert Swegler, owner of Pacific Rock).

[11] A few weeks later, on January 22, 2003, Pacific Rock filed a second petition for alternative writ of mandate, alleging that the Department of Revenue and Tax refused to allow the promissory note to be used as a setoff against

income taxes, the ability of Pacific Rock to satisfy the judgment was thus restricted, and therefore sought payment of the judgment out of the Government Claims Fund. On the same day, the trial court issued the Second Alternative Writ of Mandate, commanding the Director to pay the judgment out of the Government Claims Fund and give priority to payment of Pacific Rock's judgment over other claims or show cause why it should not do so.

[12] The trial court issued a Decision and Order on January 29, 2003, holding, *inter alia,* that the award of post-judgment interest at the rate of 6% to Pacific Rock against DOE is valid, and that if promissory notes are issued pursuant to Title 5 GCA § 22415, that an interest rate of 7% must apply. Thereafter, on February 14, 2003, the trial court ordered that the principal amount of the Pacific Rock judgment be paid from funds appropriated to the Government Claims Fund as of February 14, 2003.

[13] On March 28, 2003, the trial court issued a Judgment in the Writ Case in favor of Pacific Rock. This appeal followed.

II.

[14] This court has jurisdiction over an appeal from a final judgment. 48 U.S.C. § 1424-1(a)(2) (West, WESTLAW through Pub.L. 109-76 (2005)); Title 7 GCA §§ 3107 and 3108(a) (West, WESTLAW through Guam Pub.L. 28-037 (Apr. 22, 2005)).

[15] Generally, the grant of a writ of mandate is reviewed to determine whether the court's judgment is supported by substantial evidence. *See Sablan v. Gutierrez,* 2002 Guam 15, ¶ 6, citing *Holmes v. Territorial*

Land Use Comm'n, 1998 Guam 8, ¶ 6. However, when there are no facts in dispute, and the questions presented for review are strictly questions of law, the court's review is *de novo. See id.* When a challenge to post judgment interest rests on sovereign immunity grounds, a lower court's award of interest is reviewed *de novo. Sumitomo Constr. Co. v. Gov't of Guam,* 2001 Guam 23, ¶ 7. Issues of statutory interpretation are also reviewed *de novo. Bank of Guam v. Reidy,* 2001 Guam 14, ¶ 16.

III.

[16] The Director raises two issues on appeal. First, we consider whether the trial court erred in finding that the provision for post-judgment interest in the *Pacific Rock Corp. v. Dep't of Educ.*[3] judgment is valid, despite this court's opinion in *Sumitomo Construction Co., Ltd. v. Government of Guam,* 2001 Guam 23. Second, we consider whether the trial court erred in finding that if promissory notes are issued to Pacific Rock pursuant to 5 GCA § 22415, they must include interest at 7% per annum.

1. Award of Post-Judgment Interest

[17] The Director argues that the trial court erred in issuing the writ of mandate ordering the payment of post-judgment interest, despite this court's holding in *Sumitomo* that the legislature did not waive the government of Guam's sovereign immunity with respect to such interest.

[18] Pacific Rock contends that the Director is barred by the doctrine of *res judicata* from raising the defense of

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[3] Superior Court Case No. CV 1668-94

sovereign immunity at this stage of the litigation and further, that *Sumitomo* cannot be applied retroactively.

[19] In response, the Director asserts that because the parties in the Writ Case are different from the parties in CV1668-94, *res judicata* does not bar her from raising the sovereign immunity defense. Moreover, the Director asserts that because sovereign immunity is a jurisdictional issue, the trial court was without jurisdiction to award post-judgment interest in the first instance and therefore, that portion of the judgment is void. The Director further argues that the principles underlying sovereign immunity outweigh the policies behind the doctrine of *res judicata*.

[20] At the outset, it is important to note that the parties do not dispute our holding in *Sumitomo* that the government of Guam cannot be held liable for post-judgment interest because the legislature did not waive Guam's sovereign immunity with respect to such liability. In other words, it is undisputed that the trial court erred in awarding post-judgment interest to Pacific Rock, against DOE.

[21] The real issue therefore is whether the Director is barred by *res judicata* from attacking the portion of the judgment awarding post-judgment interest, when the judgment was appealed from by DOE and affirmed by this court, and where DOE, in its appeal and its petition for rehearing, failed to raise the issue of sovereign immunity.

[22] We first determine whether *res judicata* applies under the facts of this case. We find that it does. "Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Trans Pacific Export Co. v. Oka Towers Corp.*, 2000 Guam 3, ¶ 13 (quoting *Parklane Hoisery Co. v. Shore*, 429 U.S. 322, 327

n. 51, 99 S.Ct. 645 (1979)). While the defendant in the prior *Pacific Rock* appeal was DOE (a department of the executive branch of the government of Guam), "[a]n official-capacity suit is really just another way of suing the government. Therefore a city official sued in his official capacity is generally in privity with the municipality." *Conner v. Reinhard,* 847 F.2d 384, 394 (7th Cir.1998) (citations omitted). Moreover, prior to its amendment by Public Law 27-142:5, and at all times relevant to the facts of the instant case, Title 5 GCA § 6402 provided that "[t]he Director of Administration shall pay the amount allowed in an approved settlement or in a final court judgment rendered against any line agency of the government, or the Government of Guam in general." Title 5 GCA § 6402 (West, WESTLAW through Guam Pub.L. 28-037 (Apr. 22, 2005). We therefore find that the Director is in privity to DOE, an executive branch agency of the Government of Guam. In addition, the petitions for a writ of mandate filed in this case are based on the same causes of action filed in CV1668-94. Accordingly, under the general rule, *res judicata* would bar the Director in this case from raising the issue of sovereign immunity.[4]

[23] The question still remains, however, whether sovereign immunity will lie as an exception to the general

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[4] This result might have been different had the parties in the settlement agreement specifically agreed to waive the effects of *res judicata*. *See e.g.*, 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS, § 4415 (found at West, WESTLAW, FPP § 4415) (2d ed. 2005) ("Just as a *res judicata* defense may be lost by failure of proper pleading, courts have expressed willingness to honor an express agreement between the parties that an action on one part of the claim will not preclude a second action on another part of the same claim. . . . ") (footnote omitted).

rule of *res judicata*. The answer to this question turns on a balance of the policies underlying the finality of judgments and the court's recognition that sovereign immunity implicates a court's subject matter jurisdiction and can be raised at any time.

[24] In *Sumitomo v. Government of Guam*, we held that "sovereign immunity implicates a court's subject matter jurisdiction. . . . [and therefore] can be raised at any time, either by a party or by the court." *Sumitomo*, 2001 Guam 23 at ¶ 22 (citation omitted). In other words, if sovereign immunity applies, the action is barred because of a court's lack of subject matter jurisdiction. *See Pacific Rock II*, 2001 Guam 21 at ¶ 18.[5] In *Sumitomo*, we addressed the issue of sovereign immunity in the context of a direct attack of the trial court's judgment, and not, as in the instant appeal, in the context of a collateral attack. *See* BLACK'S LAW DICTIONARY (7th ed.1999) (defining a collateral attack as "[a]n attack on a judgment entered in a different proceeding."). Because sovereign immunity is treated as a limitation on subject matter jurisdiction, the collateral attack is governed by ordinary rules dealing with the enforcement of judgments where the rendering court's jurisdiction is challenged. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376-77, 60 S.Ct. 317 (1940). The Restatement of Judgments offers guidance on when subject matter jurisdiction may be challenged in the post-judgment context:

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[5] In *Pacific Rock II*, this court addressed the existence of a statutory waiver of sovereign immunity with respect to breach of contract claims. Again, sovereign immunity in the context of post-judgment interest was not discussed, although the court made cursory mention of the award in its background portion of the opinion.

> When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:
>
> > (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
> >
> > (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
> >
> > (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982).

[25] Specifically addressing the issue of sovereign immunity and whether a state may be permitted to collaterally attack an adverse judgment against it on the ground that the state's immunity deprived the rendering court of subject matter jurisdiction, courts have ruled either way. Some courts have held that notwithstanding the general rule that jurisdictional challenges may be raised at any time, "[i]t is elementary that any jurisdictional defect must be raised while the case is pending." *City of South Pasedena v. Mineta,* 284 F.3d 1154, 1156 (9th Cir.2002); *see also Calhoun v. Bernard,* 359 F.2d 400, 401 (9th Cir.1966) (refusing to consider issues in a second appeal that could

have been raised during the first appeal). In these courts, this rule applies to the government's failure to invoke its immunity. *See City of South Pasadena,* 284 F.3d at 1156-57 (*citing Gunter v. Atl. Coast Line R.R.,* 200 U.S. 273, 290, 26 S.Ct. 252 (1906)) (holding that a state who fails to invoke its immunity while the litigation is pending cannot do so after the lawsuit has ended because any defenses "whether brought to the attention of the court or waived, were foreclosed by the decree."). *See also* Restatement (Second) of Judgments § 12, Reporter's Note, cmt. d (discussing the case history with regard to sovereign immunity and *res judicata,* it explains that "[g]iving such effect to the sovereign immunity doctrine proves too much, for it is possible to say that any "erroneous" judgment against the government violates the scope of its waiver of immunity.").

[26] Consistent with the above authority, Pacific Rock relies primarily on *United States v. County of Cook,* a Seventh Circuit case which held that "if the court decides a case on the merits after an adversarial presentation, the judgment cannot be collaterally attacked on the ground that the court lacked subject-matter jurisdiction. The parties' failure to address jurisdiction fully or cogently does not deprive the judgment of force." *United States v. County of Cook,* 167 F.3d 381, 388 (7th Cir.1999). In *County of Cook,* the United States refused to pay interest and penalties on real estate taxes pursuant to a judgment entered against it and affirmed by the court on appeal. *Id.* at 383. There, the United States argued that the interest and penalties were barred by sovereign immunity, regardless of its lawyer's failure to invoke the immunity during the prior appeal. *Id.* The *County of Cook* court turned its focus on whether the principle of sovereign immunity is a

recognized exception to the finality of judgments rule. Disagreeing with the United States, the court stated:

> For a long time it has been understood that the United States, like a private litigant, cannot relitigate claims that have reached final judgment. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984); *United States v. Moser*, 266 U.S. 236, 45 S.Ct. 66, 69 L.Ed. 262 (1924). (The special treatment of offensive nonmutual issue preclusion, see *United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984), does not qualify this rule when identical parties contest the sequential suits.) Likewise it is settled that a "claim" for purposes of this rule means all legal theories bearing on a set of facts; an omitted argument cannot be raised later. *Nevada v. United States*, 463 U.S. at 129-30, 103 S.Ct. 2906. To create a sovereign-immunity exception to these principles would be to abolish them, for *every* suit involving the interests of the United States potentially involves sovereign immunity.

Id. at 385.

[27] In contrast to the above body of case law, the United States Supreme Court allowed an attack of a judgment after an adjudication on the merits, where the issue involved a government's sovereign immunity. *See United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 60 S.Ct. 653 (1940) (involving federal sovereign immunity); *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir.1974), *cert. denied*, 421 U.S. 991, 95 S.Ct. 1996 (1975) (involving state government immunity).

[28] In *United States Fidelity & Guaranty Company* ("*USF & G*"), the case relied upon by the Director, the

Supreme Court held that collateral estoppel does not preclude the government from invoking sovereign immunity in a royalties claim that had been actually decided in a previous action brought by the government. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 60 S.Ct. 653. The government did not raise the sovereign immunity defense in the original action, and the court adjudged the royalties claim adversely to the government. *See id.* at 510, 60 S.Ct. 653. The government then brought a second action, and United States Fidelity & Guaranty argued that the government was collaterally estopped from challenging the first decision. *See id.* at 511, 60 S.Ct. 653. The Court held, however, that sovereign immunity cannot be waived by the action of government officials by their failure to raise the sovereign immunity defense in the preceding action. *See id.* at 513-14, 60 S.Ct. 653. This is so because consent to be sued may only be granted by Congress. *See id.* at 514, 60 S.Ct. 653. The Court further held that "[t]he reasons for the conclusion that this immunity may not be waived govern likewise the question of *res judicata*. . . . Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *Id.* at 514, 60 S.Ct. 653. Weighing the policy underlying the finality of judgments against the doctrine of sovereign immunity, the court stated that in the "collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion . . . [that] the doctrine of immunity should prevail." *See id.* at 514-15, 60 S.Ct. 653. Thus, the Court recognized that the "desirability for complete settlement of all issues between parties must . . . yield to the principle of immunity." *Id.* at 513, 60 S.Ct. 653.

[29] We agree with the policy considerations and the law as laid out by the Court in *USF & G* and hold that *res judicata* does not bar a sovereign Director from asserting the government's sovereign immunity and attacking the validity of the trial court judgment granting post-judgment interest against DOE in favor of Pacific Rock.

[30] The policy considerations supporting the finality of judgments, weighed against the doctrine of sovereign immunity – which we have held to be a unwaivable jurisdictional issue – compel us to agree with the Court that, where there exists a "collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit, . . . the doctrine of immunity should prevail." *Id.* at 514-15; *see also Danning v. United States*, 259 F.2d 305, 311 (9th Cir.1958) (citing *USF & G* for the proposition that "failure to appeal an adverse judgment does not work an estoppel against the government"); *Sterling v. United States*, 85 F.3d 1225, 1231 (7th Cir.1996) (Flaum, J.) (concurring) (stating the rule a "judgment is afforded no *res judicata* effect if the claim should have been dismissed on the ground of sovereign immunity . . . [thus] if a court reaches the merits of a claim that is barred by sovereign immunity, the judgment is simply void"). Stated simply, sovereign immunity cannot be waived by the action (or inaction) of the government of Guam officials and their failure to appropriately raise the sovereign immunity defense. Rather, under section 1421a of the Organic Act of Guam, "sovereign immunity can *only* be waived by duly enacted legislation." *Sumitomo*, 2003 Guam 21, ¶ 9 (emphasis added).

[31] In so holding, we reject the analysis employed by the Seventh Circuit in *County of Cook*. Significantly, and unlike the law of our jurisdiction, the Seventh Circuit declined to view sovereign immunity as a jurisdictional doctrine. In *County of Cook*, the court stated:

> For most purposes it overstates the strength of sovereign immunity to analogize it to a lack of jurisdiction. Any difference between the two should make it easier to raise a jurisdictional objection belatedly than to raise a sovereign-immunity objection belatedly. As we have explained, what sovereign immunity means is that relief against the United States depends on a statute; the question is not the competence of the court to render a binding judgment, but the propriety of interpreting a given statute to allow particular relief.

County of Cook, 167 F.3d at 388-389. In particular, the court's view that sovereign immunity is not an issue of a court's jurisdiction conflicts with our express holding in *Sumitomo* that "[s]overeign immunity implicates a court's subject matter jurisdiction." *Sumitomo*, 2001 Guam 23, ¶ 22.

[32] We therefore reverse the trial court's holding that the portion of the judgment entered in CV1668-94, granting post-judgment interest against the government of Guam, is valid.[6]

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[6] This result is not, as the trial court appears to conclude, a matter of *Sumitomo* being applied retroactively. The government of Guam enjoys sovereign immunity "in the absence of an express statutory waiver of immunity against postjudgment interest" and therefore "the government is not liable for such interest." *Sumitomo*, 2001 Guam 23 at

(Continued on following page)

2. Interest on Promissory Notes

[33] The next issue for our consideration is whether the trial court erred in holding that promissory notes issued pursuant to Title 5 GCA § 22415 must bear an interest of 7%. Specifically, the Director argues that because *Sumitomo* holds that the legislature has not waived the government of Guam's immunity with respect to post-judgment interest, then the principal amount of the judgment, reduced to promissory notes pursuant to Title 5 GCA § 22415, cannot bear an interest of 7%, because the interest would constitute "post-judgment interest." Pacific Rock argues that Title 5 GCA § 22415 applies to all "creditors" of the government of Guam. Further, Pacific Rock contends that the plain reading of the statute calls for an interest rate of 7%, and does not implicate this court's holding in *Sumitomo*.

[34] Title 5 GCA § 22415, entitled "Promissory Note; Issuance to Creditors," states in relevant part:

> *Any creditor* of the government of Guam (*other than a tort claimant with an unadjudicated claim*) who is not paid within thirty (30) days of filing his claim may file a request for the Director of Administration for issuance of a one year negotiable promissory note payable to bearer from the

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¶ 27. The existence of sovereign immunity, while discussed and clarified by this court in *Sumitomo*, exists not merely as a result of *Sumitomo*, but rather, by virtue of the Organic Act of Guam. "The Organic Act provides a very specific mechanism by which the government of Guam's inherent sovereign immunity may be waived. Under the Organic Act, a waiver of immunity must be in the form of duly enacted legislation." *Id.* at ¶ 24 (citing Title 48 U.S.C. § 1421a).

> Government of Guam, bearing interest at 7% per annum.

Title 5 GCA § 24415 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005).

[35] "In cases involving statutory construction, the plain language of a statute must be the starting point." *Pangelinan v. Gutierrez,* 2000 Guam 11, ¶ 23. A plain reading of the above provision indicates that it applies to "any creditor" of the government of Guam, except tort claimants with unadjudicated claims. It does not except from the statute judgment creditors, a position argued by the Director. The Director provides no authority in support of her position that the 7% interest does not apply to judgment creditors and further, that the interest on the promissory note constitutes "post-judgment interest" if the creditor is a judgment creditor.

[36] We therefore affirm the trial court's holding that notes issued pursuant to section 22415 for payment of the principal amount of the judgment must bear interest at 7% per annum.

IV.

[37] We hold that the trial court erred in upholding the validity of the portion of the judgment in CV1668-94 awarding post-judgment interest against DOE. We further hold that the policies and principles underlying the rule of finality of judgments are outweighed by the doctrine of sovereign immunity. Lastly, we hold that the trial court properly concluded that notes issued pursuant to Title 5 GCA § 22415 must bear interest at the rate of seven percent (7%) per annum. Accordingly, we **REVERSE** in

part, **AFFIRM** in part, and **REMAND** for entry of judgment consistent with this opinion.

Robert J. Torres
ROBERT J. TORRES
Associate Justice

Frances Tydingco-Gatewood
FRANCES M. TYDINGCO-GATEWOOD
Associate Justice

F. Philip Carbullido
F. PHILIP CARBULLIDO
Chief Justice

IN THE SUPREME COURT OF GUAM

PACIFIC ROCK CORPORATION, Petitioner-Appellee, Vs. LOURDES M. PEREZ, in her capacity as Director of Administration, Government of Guam, Respondent-Appellant.	)	Supreme Court Case No. CVA03-010 Superior Court Case No. SP0218-02 **JUDGMENT** (Filed Oct. 12, 2005)

APPEAL from the Superior Court of Guam.

THIS CAUSE came before this court on February 20, 2004. ON CONSIDERATION THEREOF, it is now hereby ordered and adjudged by this court that the appeal from the Superior Court of Guam is that we **REVERSE** in part, **AFFIRM** in part, and **REMAND** for entry of Judgment consistent with this opinion.

Dated this 12th day of September, 2005.

IN THE SUPREME COURT OF GUAM

PACIFIC ROCK CORPORATION, Petitioner-Appellee, Vs. LOURDES M. PEREZ, in her capacity as Director of Administration, Government of Guam, Defendent-Appellant.	Supreme Court Case No. CVA03-010 Superior Court Case No. SP0218-02 **Notice of Entry on Docket** (Filed Oct. 12, 2005)

TO: PHILLIP D. ISSAC
287 W. O'Brien Dr.
Hagatna, Guam 96910

THOMAS M. TARPLEY, JR.
American Life Bldg.
137 Murray Blvd., Ste 201
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On October 12th 2005, the Judgment filed on October 12, 2005, was entered on the docket in the above-entitled matter.

Dated this 12th Day of October 2005.

JEANNE G. QUINATA
Clerk of Court

By: /s/ [Illegible]
for Clerk of Court

DECLARATION OF MAILING

On the 12th day of October, 2005, I enclosed and sealed a copy of the *NOTICE OF ENTRY ON DOCKET* in an envelope addressed to the individuals in said notice. I caused the same envelopes with postage affixed to be placed in the U.S. Mail.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 12th day of October, 2005.

/s/ [Illegible]
LISA C. IBANEZ
Declarant

IN THE SUPERIOR COURT OF GUAM

PACIFIC ROCK CONSTRUCTION,	**SPECIAL PROCEEDINGS CASE NO. SP218-02**
Petitioner,	
v.	
LOURDES M. PEREZ, in her official capacity as the Director of Administration, Government of Guam,	**DISISION YAN OTDEN**[1]
Respondents.	(Filed Jan 29, 2003)

The Court heard Petitioner's writ of mandamus application 10 January 2003. Thomas M. Tarpley, Jr., Esq., of Tarpley & Moroni, LLP, represented the Petitioner. Eric A. Heisel, Esq., Assistant Attorney General, represented Respondent, the Director of the Department of Administration. Joaquin V. E. Manibusan, Jr., sitting, presided over the proceedings. The parties presented their arguments and at its conclusion, the Court took the matter under advisement although it indicated that it was inclined to grant Petitioner's application. The Court, having reviewed the briefs, exhibits, affidavits, arguments of counsel; and after giving the matter due consideration; now issues the following Decision and Order and finds that the Writ of Mandate sought herein shall be granted.

[1] Decision and Order

BACKGROUND

Petitioner is the Plaintiff in Civil Action CV 1668-94 (Pacific Rock Corporation vs. Department of Education "DOE"). Following a month long trial, this Court issued its Decision on 26 February 1997 awarding damages to Petitioner based upon a contract obligation. Judgment was entered on 7 August 1997. The Court heard post trial motions and amended its original Decision and Order on 1 December 1997. In its final decision, this Court awarded damages to Petitioner in the sum of $526,602.04 plus interest thereon at the rate of 6% per annum until paid.

Defendant DOE appealed the Judgment. The Supreme Court of Guam in 2000 Guam 19 ***(Pacific Rock I)*** reversed the Judgment of this Court. In a petition for rehearing, the Supreme Court modified its holding in ***Pacific Rock I*** and affirmed the Judgment of the Superior Court[2]. Petitioner has filed the present writ against the Director of the Department of Administration, seeking payment of its Judgment from the Government Claims Fund administered by that Department. Clifford Guzman, then the Director of Administration, was named as Defendant. He has since been substituted by Lourdes M. Perez, the present Director, and she is now the named Defendant. Petitioner has alleged in its application that the Guam Legislature has appropriated $216,021 from the General Fund for the 2003 Fiscal Year to the Government Claims Fund.

The Respondent objects to payment of that part of the Court's Judgment which provides Pacific Rock with post judgment interest. The principle amount of the Judgment

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[2] See 2001 Guam 21.

is not in issue and Respondent has issued promissory notes to Pacific Rock for its payment. The sole issue before the Court is the collection of Pacific Rock's post judgment interest.

DISCUSSION

A. A WRIT OF MANDATE IS APPROPRIATE HEREIN TO COMPEL PAYMENT OF THE POST JUDGMENT INTEREST

Petitioner petitions the Court for a writ of mandate. Such writ "may be issued by any court . . . to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station . . . " See 7 G.C.A. § 31202. Additionally, "[t]he writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." See 7 G.C.A. § 31203.

In applying these statutes, the Supreme Court of Guam has provided the following inquiry:

> (i) Is the respondent an inferior tribunal, corporation, board or person? *See* 7 GCA § 31202;
>
> (ii) Has the respondent failed to perform a clear, present duty, having the legal authority and present ability to do so? *See* 7 GCA § 31202 *Treber v. Superior Court,* 68 Cal. 2d 128, 134 65 Cal. Rptr. 330, 334 (Ct. App. 1968);
>
> (iii) Does the duty entail ministerial action, the assumption of jurisdiction, the exercise of discretion or the abuse of discretion? *See State Bd. of Equalization v. Watson,* 68 Cal. 2d 307, 66 Cal. Rptr. 377 (1968);

(iv) Does the petitioner have a clear, present right, *see* 7 GCA § 31202; *Berry v. Coronado Bd. Of Educ.*, 238 Cal. App. 2d 391, 47 Cal. Rptr. 727 (Ct. App. 1965), and beneficial interest in the performance of the respondent's duty? *See Silva v. Cypress,* 204 Cal. App. 2d. 374, 22 Cal. Rptr. 453 (Ct. App. 1962);

(v) Does the petitioner have another remedy at law, and if so, is it adequate? *See* 7 GCA § 31203; and

(vi) Is the petition verified? *See* 7 GCA § 31203. See *Bank of Guam v. Reidy,* 2001 Guam 14, ¶27 (June 20, 2001).

After considering these factors, the Court concludes that the writ of mandate should issue herein for the reasons stated below.

B. SUMITOMO (2001 Guam 23) IS TO APPLIED PROSPECTIVELY AND NOT RETROACTIVELY

In *Sumitomo Construction Co., Ltd. vs. Government of Guam, 2001 Guam 23,* decided 7 November 2001, the Supreme Court held that the Government of Guam was not liable for post judgment interest. Based upon that ruling, Respondent asks this Court to deny Pacific Rock the post judgment interest provided for in its Judgment against DOE.

Pacific Rock II (2001 Guam 21) was also decided the same day that the Supreme Court decided *Sumitomo.* ***Pacific Rock*** II preceded *Sumitomo.* In Pacific Rock, the Judgment appealed from was entered on 7 August 1997. In *Sumitomo,* the Judgment appealed from was entered 1 March 2001, approximately four years later.

On 7 November 2001, the Supreme Court affirmed the Judgment entered by the Superior Court on 7 August 1997, as amended on 1 December 1997, in which the Court awarded Pacific Rock damages in the sum of 526,602.04 with interest at 6% per annum until paid. Respondent opposes the payment of post judgment interest because of the Supreme Court's ruling in Sumitomo. Respondent takes the position that Pacific Rock's judgment awarding post judgment interest, although affirmed by the Supreme Court, is void under Sumitomo[3].

The Court declines to adopt Respondent's position. If the Court were to adopt Respondent's position, Respondent would have the right to set aside Judgments that have reached finality; i.e., it would allow Respondent to relitigate issues that have reached final judgment; and it would further allow Respondent to collaterally attack judgments for lack of subject matter jurisdiction when those issues were never raised on its appeal. Moreover, it is the Court's opinion that Sumitomo is to be applied prospectively and is not to be retroactively applied to Pacific Rock. This Court cannot allow Respondent to go back in time and search for all judgments which have allowed post judgment interest against the government (as is the case in *Pacific Rock*) and give Respondent the green light to set aside those judgments, all in the name of *Sumitomo*. Certainly, the principles of res judicata and collateral estoppel should apply to prevent such a result. See *United States of America vs. County of Cook, Illinois*, 167 F. 3rd 381, (1999).

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[3] Respondent takes the position that the payment of post judgment interest is a sovereign immunity issue and sovereign immunity is jurisdictional and can never be waived.

C. THE DEPARTMENT OF ADMINISTRATION HAS A MINISTERIAL DUTY TO MAKE PAYMENTS FROM THE CLAIMS FUND TO PETITIONER

In order for a writ to issue, the Court must first determine whether the law imposes a ministerial duty to act. It is well settled that "the critical question in determining if an act required by law is ministerial in character is whether it involves the exercise of judgment and discretion." See *Jenkins v. Knight*, 46 Cal. 2d 220, 223-224 (1956). In the instant matter, the Court finds that the law imposes a non-discretionary duty on the Department of Administration by the plain language of the controlling statute.

In support of the instant petition, Petitioner argues that the unequivocal and mandatory language of 5 G.C.A. § 6402 demonstrates its entitlement to mandamus relief herein. The statute provides, in pertinent part:

> The Director of Administration shall pay the amount allowed in an approved settlement or in a final court judgment rendered against any line agency of the government, or the Government of Guam in general. All payments under this Chapter not made on account of the liability of autonomous agencies shall be made out of the Government Claims Fund only.

The Court agrees that the mandatory language cited above establishes the right of *Pacific Rock* to receive payments from the Government Claims Fund and requires the Department of Administration to pay *Pacific Rock* funds from the said Fund. The above statute clearly impose a non-discretionary duty on the Director of the Department of Administration to make the payments for

which ***Pacific Rock*** is seeking mandamus relief, satisfying the judicially created prerequisite.

The Court is not persuaded by Respondent's argument that the Attorney General's Office must be given authority to decide whether contract claims should be paid out of the Government Claims Fund or not. Respondent argues that the Fund should be left intact and used generally for the purpose of satisfying negligence claims, which are not budgeted for by a particular department. Respondent argues that it has been the past practice of departmental agencies to use the Government Claims Fund as a supplemental appropriation by entering into contracts and using the Fund as the source of its payment. The Attorney General argues that departments must be responsible for paying their contractual obligations and not rely on the Claims Fund for that purpose. Respondent, however, has failed to present evidence before the Court that this is indeed the practice of departmental agencies of the government of Guam; that the departments have used the Government Claims Fund as a means of paying their contractual obligations which been budgeted for. The Court notes, however, that departments, while they budget for payment of contractual obligations, rarely budget for damages resulting from a breach of contract as is the case with Pacific Rock.

Assuming however, that there is merit in this contention, Respondent fails to recognize that the Government Claims Fund statute is very clear on its face. The statute requires the Director of Administration to make payments on approved settlements or final court judgments. No discretion is given to the Attorney General to deny payments to a creditor solely because the creditor's claim is based upon a contract claim. Claims, whether based upon

contract or tort, are paid from the same Fund and no preference is given to one or the other.

D. *PACIFIC ROCK* HAS A CLEAR AND PRESENT RIGHT AND BENEFICIAL INTEREST IN THE PERFORMANCE OF DOA'S DUTY

The plain language of the Government Claims Fund statute demonstrates Pacific Rock's present right and beneficial interest in compelling the Department of Administration to perform its duty of paying a final judgment from the Fund. *Pacific Rock* has been awarded a final judgment form the Superior Court of Guam and that Judgment has been affirmed in the Supreme Court of Guam. *Pacific Rock* filed its claim under the Government Claims Act and has followed the procedure for obtaining a judgment against the government of Guam. Now that it has obtained a Judgment against the government, it is entitled to payment from the Government Claims Fund to satisfy that judgment. This si what the law provides for and mandates.

D. *PACIFIC ROCK* DOES NOT HAVE AN ADEQUATE REMEDY AT LAW

A final consideration in determining whether a writ of mandate should issue is whether the petitioner has an adequate remedy at law. See 7 G.C.A. §31203. This determination is within the discretion of the trial court from which a writ of mandate is sought. See *Sutco Construction Co. v. Modesto High School,* 256 Cal. Rptr. 671 (1989). In opposition to the petition herein, Respondent argues that Pacific Rock has an adequate remedy at law because it can avail itself of the promissory note procedure established

under **5 GCA § 22415.** This section provides that "any creditor of the government of Guam (other than a tort claimant with an unadjudicated claim) who is not paid within thirty (30) days of filing his claim may file a request for the Director of Administration for issuance of a one year negotiable promissory note payable to bearer from the Government of Guam, bearing interest at 7% per annum." The Director of Administration (within 30 days of the request) shall either issue said promissory note or shall deliver to the claimant a statement that part or all of the claim is disputed. The Director shall issue a promissory note for any part of the claim which is not disputed. If disputed or disputed in part, the Director of Administration shall designate a hearing officer for a hearing pursuant to the Administrative Adjudication Law, set a hearing date not less than 30 days nor more than 60 days from the date of the statement, and indicate with particularity the reasons the claim is disputed. If no such statement of disputed claim is issued within 30 days, the claim is deemed undisputed.

Any such promissory note may be used by the bearer at the face value plus accrued interest for payment of tax or other obligation due the Government of Guam. If only part of the promissory note is used for such purpose, the Director of Revenue and Taxation may make a notation of partial redemption on the back of the note indicating amount redeemed, date, balance due, etc., or may issue a new promissory note with the same expiration date for the balance due. At the request of the bearer, any excess amount may be credited against future obligations at no additional interest. The promissory note may not be used in payment of sums due autonomous agencies or instrumentalities of the Government of Guam.

Respondent contends that the above law was enacted to provide a remedy for creditors of the government who were having difficulty collecting bona fide debts owed to them to the government. The remedy of the promissory notes is adequate because the notes are negotiable as bearer instruments "so that even if the claimant does not pay taxes, the notes can be negotiated freely to third parties." If the claim is disputed, a hearing must be held between 30 to 60 days after the Director makes the finding.

The Court finds that the promissory note provision of 5 GCA §22415 does not provide an adequate remedy for Pacific Rock. Pacific Rock is a judgment creditor of the government. As a judgment creditor, it is entitled to execution for the payment of its judgment from the Government Claims Fund. As a judgment creditor, it should not be required to file a claim with the Department of Administration so that its Director can make a determination whether the claim is valid or whether there is a basis to dispute the claim. Its claim has already been filed and has gone through the legal process. Moreover, the courts have already determined the validity of the judgment or the claim. Once a Plaintiff becomes a judgment creditor of the government, it can only sit and wait for an appropriation from the Legislature to the Government Claims Fund.

The remedy provided by the above statute also is inadequate because the instrument given under the promissory note is not a negotiable instrument. To be a negotiable instrument under Article 3 of the UCC, "an instrument must be a writing signed by the maker or drawer; it must contain an unconditional . . . promise . . . to pay a sum certain in money." See Black's Law Dictionary, Fifth Edition. Promissory notes issued by the government

under the above statute can only be used by the bearer for the "payment of tax or other obligation due the Government of Guam." It is not an unconditional promise to pay a certain sum of money. Creditors who have judgments against the government cannot be forced to accept these promissory notes as repayment of monies due them by the government. These notes are valueless to creditors who have no government obligations. These notes cannot be used to pay loans with lending institutions and to pay any other indebtedness other than a government debt. However, a judgment creditor who obtains a payment through an appropriation from the Claims Fund can pay a loan with a lending institution; can pay any other indebtedness and can place the amount in a bank for purposes of generating interest.

If the statute were indeed to apply, Respondent must **unequivocally** give a promissory note to *Pacific Rock* with interest at 7% per annum as is required thereunder, thus circumventing the holding in *Sumitomo*. Respondent, however, has issued notes to *Pacific Rock* in settlement of its obligations against *Pacific Rock*, but refused to pay interest in light of the *Sumitomo* holding. While *Pacific Rock*[4] may voluntarily accept these notes for repayment of the government's obligation, it is not obligated to do so.

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[4] The Court notes that Pacific Rock has indeed argued that the promissory notes it has received from Respondent should contain the 7% interest amount required by 5 GCA §22415.

CONCLUSION

After having considered Petitioner's application, the Court finds that issuance of the Writ of Mandate is appropriate herein. The *Sumitomo* holding which disallows post judgment interest against the government of Guam cannot be applied herein because its application is barred by the principles of res judicata and collateral estoppel. Moreover, the holding in Sumitomo is to be applied prospectively and not retroactively. The Court has also found that Petitioner has no adequate remedy at law and that Respondent has a ministerial duty to pay final judgments from the Government Claims Fund without regard as to whether the claim is one in contract or in tort.

For the reasons stated above, this court finds that Petitioner's application for Writ of Mandate shall issue. These are the findings of the Court.

So ordered this 29th day of January, 2003.

/s/ Joaquin V.E. Manibusan, Jr.
Joaquin V.E. Manibusan, Jr.
Judge, Superior Court of Guam

IN THE SUPREME COURT OF GUAM

PACIFIC ROCK CORPORATION
Plaintiff-Appellee

vs.

DEPARTMENT OF EDUCATION,
a department of the Executive Branch
of the Government of Guam, an unincorporated
Territory of the United States of America
Defendant-Appellant

OPINION

Supreme Court Case No.:CVA98-003
Superior Court Case No.:CV0668-94

Cite as: 2001 Guam 21

Petition for Rehearing
Argued and submitted on Sept. 21, 2001
Hagåtña, Guam

(Filed Nov. 7, 2001)

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice (Acting)[1], JOHN A. MANGLONA, Designated Justice, RICHARD H. BENSON, *Justice Pro Tempore*.

CARBULLIDO, C.J.

[1] In our previous holding in *Pacific Rock Corp. v. Department of Education*, 2000 Guam 19 (hereinafter "*Pacific Rock I*"), we espoused a bright-line test, wherein we held "that the Procurement Law controls actions against the Government of Guam for contracts procured under the statute. . . ." We maintain our intent in the *Pacific Rock I* opinion to "clarify and interpret the policies intended by the Legislature in promulgating the Procurement Laws," however, in our present holding, we recognize the interplay between the Guam Procurement Law (hereinafter "Procurement Law") and the Government Claims Act (hereinafter "Claims Act") in a breach of contract case praying for monetary damages. Consequently, in our present opinion, we affirm the basic brightline test in *Pacific Rock I*, but we modify our opinion in breach of contract cases that involve money owed to or by the Government of Guam. Today, we hold that "the Procurement Law controls actions against the Government of Guam for contracts procured under the statute," however, in breach of contract suits where monetary relief is sought, the Procurement Law serves as the final administrative remedy that is a prerequisite to filing a claim pursuant to the Claims Act.

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[1] The Chief Justice recused himself from this case, and as the only full-time justice on the panel, Justice Carbullido was appointed Acting Chief Justice.

I.

[2] This case arises out of a procurement contract between Pacific Rock Corporation (hereinafter "Pacific Rock") and the Department of Education (hereinafter "DOE"). Pacific Rock submitted and DOE accepted a bid for project no. 710-5-1070-L-TER. The project was for the construction of temporary classrooms at J.Q. San Miguel, Agana Heights, Yigo, Wettengel, M.A. Ulloa, Finegayan, and P.C. Lujan elementary schools. Collectively referred to as one project, the construction work was composed of four individually signed contracts. Identical in its form notwithstanding specific project names and locations, each of the four contracts contained a "Disputes Clause" which stated in pertinent part:

> Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer whose decision shall be final and conclusive upon the parties thereto. In the meantime the Contractor shall diligently proceed with the work as directed.

Plaintiff-Appellee's Supplemental Excerpts of Record (Trial Exhibits A, B, C, D). In addition, paragraph IX(2)(a) of the general conditions of the contracts provided in relevant part:

> Except as otherwise provided in this contract, any disputes arising under this contract shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive.

Defendant-Appellant's Excerpts of Record, Tab 26 (Exhibit 2).

[3] After the award and upon scrutiny of the project specifications, Pacific Rock discovered nonconformities with applicable building codes and lodged a protest of the award. Nevertheless, in a letter dated June 29, 1990, Pacific Rock's president, Delbert Swegler, informed DOE that despite the discrepancies, the company would commence construction per DOE's plans and specifications. However, the company would not take liability for building code violations.

[4] In a letter dated July 6, 1990, then Director of DOE and Contracting Officer, Anita Sukola (hereinafter "Sukola"), responded that she took Pacific Rock's indication of intent to commence construction to mean that the company was rescinding its protest of the bid award. Further, Sukola informed Pacific Rock that it was responsible for bringing attention of known code violations to and resolving such violations with the Department of Public Works. Sukola asked Pacific Rock to respond if she mistook Pacific Rock's position, but Pacific Rock gave no such response. Instead, Pacific Rock and DOE executed the four contracts under the project on or about August 20, 1990.

[5] To address concerns over the project, Pacific Rock, its consultant, CIC Consultants, Inc., Department of Public Works, and DOE's construction manager and Contracting Officer's representative, E.V. Baldeviso & Associates (hereinafter "Baldeviso") held a technical coordination meeting. At the meeting, the parties discussed no less than twenty-one separate issues and appeared to have resolved most of the issues.

[6] On August 21, 1990 and August 22, 1990, DOE issued the notices to proceed with the construction. Pacific Rock thereafter commenced construction. However, as Pacific Rock proceeded with the construction, deficient specifications necessitated some eighty-two changes to the project. *See* Plaintiff-Appellee's Supplemental Excerpts of Record (Trial Exhibits 41-1 through 41-9). Despite these snags, Pacific Rock completed the project, and final inspection was made on August 16, 1991. The final payment was also due at this time.

[7] Pacific Rock was unable to obtain final payment for both the remaining amounts under the contract and for the change orders. Shortly thereafter, Baldeviso requested justification from Pacific Rock for the reasons behind the project's delay. In response to Baldeviso's request, on May 26, 1992, Pacific Rock submitted a detailed itemization for their reasons in the delay. On December 28, 1992, Pacific Rock's attorney, Thomas Keeler, sent a letter to DOE demanding payment of $639,607.60, which represented both the remaining amounts under the contract and the change order monies. DOE responded to this letter on February 2, 1993, wherein a new Director, Franklin J.A. Quitugua (hereinafter "Quitugua") informed Pacific Rock that DOE would agree to a total sum of $272,875.05. Quitugua also informed Pacific Rock that the company could submit change orders with invoices under protest then pursue legal remedies. On February 8, 1993, Quitugua wrote another letter informing Pacific Rock that DOE would not process change orders or invoices under protest and that its position was non-negotiable.

[8] On February 10, 1993, Pacific Rock requested that DOE reconsider its position. DOE agreed, and in a letter dated February 24, 1993, Quitugua offered to form a team

consisting of the Attorney General's Office, DOE's own attorney, and Baldeviso to investigate the matter and participate in negotiations. On March 23, 1993, Pacific Rock responded that it would be amenable to negotiations and reiterated its demand for immediate payment at least to the undisputed amount of $272,875.05.

[9] Investigation commenced and on June 12, 1993, Baldeviso, as the Contracting Officer's representative, issued its first report summarizing approvals and disapprovals of the change order claims requested by Pacific Rock. On July 6, 1993, Baldeviso issued its second report summarizing an assessment of liquidated damages for the four packages. Essentially, Baldeviso recommended that a majority of the eighty-two change order items that Pacific Rock requested be disapproved. Baldeviso also calculated that the Government was entitled to $91,500.00 in liquidated damages. On July 20, 1993, Dennis L. Boaz, from the Attorney General's office, informed Pacific Rock in a letter that, based on Baldeviso's analysis, the Government would offer a total of $281,399.24, net of liquidated damages.

[10] Unsuccessful in negotiations, on November 4, 1994, Pacific Rock filed a government claim under the Claims Act against DOE. On November 16, 1994, Pacific Rock filed the underlying complaint against DOE in the Superior Court. Pacific Rock supplemented its complaint on September 18, 1995. DOE moved for summary judgment on November 6, 1995, which the trial court denied. A four-week bench trial was held on August 26, 1996 through September 23, 1996, and subsequently, the trial court ruled in favor of Pacific Rock, denying DOE liquidated damages but awarding Pacific Rock a total of $514,258.76 in damages plus prejudgment and post-judgment interest.

Record on Appeal, Tab 72, p. 71 (Decision and Order, Feb. 26, 1997).

[11] Although not clear in its decision, the trial court apparently took jurisdiction over the matter pursuant to the Claims Act, Title 5 GCA § 6101 et seq. (1998). The court determined that Pacific Rock substantially complied with the Claims Act procedures and that its claim arose based on a rule that, "in order for a claim to arise, a claim made by the Plaintiff must be first denied, thus creating a disputed claim with the Government." The court applied this rule to conclude that the July 20, 1993 letter from the Attorney General's office was the final decision required under the Procurement Law to start the running of the limitations period under the Claims Act. Since the administrative claim under the Claims Act would be barred if no claim was filed within eighteen months of the claim arising, Pacific Rock would be barred if it failed to file its government claim by January 20, 1995. Because Pacific Rock filed its complaint on November 4, 1994, the court found the action timely, thus conferring jurisdiction on the trial court and allowing the court to proceed to the merits of the claim.

[12] DOE filed an appeal of the trial court's decision to this court and on June 2, 2000, we reversed the trial court's earlier ruling. We held that Pacific Rock's claim was not filed within the statute of limitations afforded in the Procurement Law and therefore, the trial court had no jurisdiction over the matter. On June 16, 2000, Pacific Rock filed a Petition for Rehearing. Pacific Rock then filed a Petition for Writ of Mandamus at the Ninth Circuit on April 3, 2001. The Ninth Circuit denied Pacific Rock's Petition on June 20, 2001 without prejudice, and gave this court sixty days to issue an order on the Petition for

Rehearing. On July 9, 2001, we granted Pacific Rock's Petition for Rehearing on this matter.

II.

[13] We have jurisdiction over the appeal of the final judgment of the court below pursuant to Title 7 GCA §§ 3107, 3108 (1998). We review issues of statutory interpretation and jurisdiction *de novo*. *Taijeron v. Kim*, 1999 Guam 16, ¶ 9 (citation omitted). The point at which a statute of limitations begins to run is a question of fact. *Suzuki v. Holthaus*, 375 N.W.2d 126, 128 (Neb. 1985) (quoting *Interholzinger v. Estate of Dent*, 333 N.W.2d 895, 899 (Neb. 1983)). We review a trial court's findings of fact for clear error. *Hemlani v. Nelson*, 2000 Guam 9, ¶ 8 (citing *Yang v. Hong*, 1998 Guam 9, ¶ 4).

III.

[14] In its original appeal of the trial court's decision, DOE raised the following issue on appeal:

> Whether the trial court erred in finding that Pacific Rock's claims were filed within the 18-month statutory period and thus not precluded by the Claims Act?

[15] To maintain its assertion that Pacific Rock's claims were not filed within the eighteen month statutory period and, therefore, were precluded by the Claims Act, DOE argued three points. First, the eighteen month filing period prescribed by the Claims Act is jurisdictional and cannot be tolled by participation in negotiations or by making offers of settlement. Second, Pacific Rock was aware that it had a claim against the Government on

February 8, 1993. Third, Procurement regulation 9 103.04.2 is not a provision of the Claims Act. In *Pacific Rock I*, having considered these arguments, we reversed the trial court's decision and found that Pacific Rock failed to timely file its claim at the Superior Court, leaving the court without jurisdiction to decide the case.

[16] Pursuant to Rule 31 of the Guam Rules of Appellate Procedure[2], Pacific Rock, in support of its Petition for Rehearing, proffers four contentions. First, the court's ruling should not apply to the undisputed amounts under the contract that the Government neglected to pay. Second, the Government failed to properly notify Pacific Rock of its right to administrative review; and therefore, Pacific Rock is not bound by the limitations period set forth in the Procurement Law. Third, the Government waived its right to rely on the limitation provisions of the Procurement Law by failing to plead the statute in its answer or otherwise raise the statute at any time in the proceedings below. Fourth, the limitations provisions of the Procurement Law do not apply to contract claims for the payment of money.

[17] We address both DOE's points of argument in the original appeal as well Pacific Rock's four contentions in

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[2] Rule 31, entitled *Petition for Rehearing*, of the Guam Rules of Appellate Procedure states in pertinent part:

> The petition shall state with particularity the points of law or fact which in the opinion of the petitioner, the Court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. An issue not previously briefed by the parties can not be raised for the first time in a petition for rehearing in the Supreme Court of Guam.

Guam R. App. P. 31(a).

its Petition for Rehearing in our resolution of the fundamental issue of this case, which is, whether Pacific Rock's breach of contract claim seeking monetary damages against DOE was barred by the statute of limitations. The resolution of that issue is contingent on this court's determination of two separate, but interrelated queries: (1) what is the proper statute of limitations applicable to the instant case, and (2) when did Pacific Rock's claim arise.

A. Statute of Limitations

[18] Pacific Rock, in its Petition for Rehearing, argues that this court incorrectly raised *sua sponte* the issue of lack of jurisdiction based on the statute of limitations in *Pacific Rock I*. We disagree. The "waiver of sovereign immunity is jurisdictional in nature so that if the action is barred, the Court lacks subject matter jurisdiction over plaintiff's claim." *Johnson v. United States*, 2000 WL 968795, at *2 (D. Kan. June 27, 2000) (citing to *Bradley v. United States*, 951 F.2d 268, 270 (10th Cir.1991). Furthermore, in claims against the government, "statute of limitations [are] 'jurisdictional in nature and, as an express limitation on the waiver of sovereign immunity, may not be waived.'" *Cooper v. United States*, 47 Fed. Cl. 115, 117 (2000) (quoting *Hart v. United States*, 910 F.2d 815, 818-19 (Fed. Cir. 1990)) (internal citations omitted); *see also Superior Court v. Topasna*, 1996 Guam 5, ¶ 6 (stating jurisdictional defects cannot be waived); *see also Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1571 (Fed.Cir. 1994); *see also Kirby v. United States*, 201 Ct.Cl. 527, 539 (1973). The resulting import of this principle is that jurisdictional issues may be raised at any time. *See Lujan v. Lujan*, 2000 Guam 21, ¶ 15. Therefore, this court in

Pacific Rock I, did not err in raising the issue regarding the statute of limitations *sua sponte*.

[19] In our resolution of the first issue regarding the proper statute of limitations to apply in this case, we reiterate the basic starting point of discussion in our *Pacific Rock I* opinion, the waiver of sovereign immunity. "[T]he doctrine of sovereign immunity applies to Guam." *Guam Econ. Dev. Auth. and Guam Visitors Bureau v. Island Equip. Co.*, 1998 Guam 7, ¶ 6 (citing *Marx v. Gov't. of Guam*, 866 F.2d 294, 298 (9th Cir. 1989)). The Organic Act of Guam clearly states that the Government of Guam "with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to . . . the exercise by the government of Guam of any of its lawful powers." 48 U.S.C. § 1421a (1987); see also *Island Equip.*, 1998 Guam 7 at ¶ 6.

[20] In order for a suit to be maintained, therefore, against the Government of Guam and any of its instrumentality such as DOE, there must be an express waiver of sovereign immunity by the Guam Legislature. *See* 48 U.S.C. § 1421a; *see also Wood v. Guam Power Auth.*, 2000 Guam 18, ¶ 10. In the case at bar, two statutes, the Procurement Law and the Claims Act, have been proposed as the statute conferred by the Guam Legislature as the express waiver of sovereign immunity by the government in a breach of contract suit praying for monetary relief. As reflected in our previous holding, the trial court's holding, as well as both the parties' appellate briefs, there has been much confusion as to the proper statute to apply. The determination of which statute of limitations provision applies to the instant action is dispositive in our analysis to both the issues of whether Pacific Rock met the statute of limitations and when Pacific Rock's claim arose.

1. Procurement Law

[21] We first turn our focus to the statute our court previously determined and applied as the controlling statute in the case between Pacific Rock and DOE, the Procurement Law. In *Pacific Rock I*, we held that the trial court did not have jurisdiction to hear the case. The rationale for our opinion was based on three premises. First, a party who seeks judicial relief from administrative action taken under the Procurement Law is not required to comply with the Claims Act. Second, the contract and cause of action arose pursuant to the Procurement Law. Third, the legislature intended that the Procurement Law controls when a cause of action arises under a contract procured through the Procurement Law. In our opinion today, we embrace the overarching rule set forth in *Pacific Rock I* that the Procurement Law applies to contracts procured under the Procurement Law; however, we hold that in breach of contract claims praying for monetary damages, the Procurement Law does not contain the requisite waiver of sovereign immunity to bring the case into court.

a. Legislative History of the Guam Procurement Law

[22] The crux of the misunderstanding of which statute to apply stems from the Procurement Law's rich, but perplexing legislative history. In order to guide us in our understanding and interpretation of the Procurement Law, we therefore, examine the legislative history behind the Law.

[23] The provisions of the Guam Procurement Law, codified in the Guam Government Code §§ 6950-82 (1982),

were originally adopted from the Model Procurement Code by the 16th Guam Legislature in 1982. Guam Pub. L. 16-124 (Dec. 30, 1982). The following three sections under the original Law would have been applicable to the case at bar, which involves a breach of contract claim praying for monetary relief.

[24] First, GGC §§ 6975.2(a) through (f) addressed the Procurement Law's applicability and the Chief Procurement Officer's authority in resolving contracts and breach of contracts controversies. Because of the significance of this section, we outline relevant portions of the section in this opinion. Section 6975.2 provides:

> (a) Applicability. This Section applies to controversies between the Territory and a contractor and which arise under, or by virtue of, a *contract* between them. This includes without limitation controversies *based upon breach of contract*, mistake, misrepresentation, or other cause for contract modification or rescission.
>
> (b) Authority. The Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or a designee of one of these officers is authorized, prior to commencement of an action in a court concerning the controversy, to settle and resolve a controversy described in Subsection (a) of this Section. This authority shall be exercised in accordance with regulations promulgated by the Policy Office.
>
> (c) Decision. If such a controversy is not resolved by mutual agreement, the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or the designee of one of these officers shall promptly issue a decision in writing. The decision shall:

(1) state the reasons for the action taken; and

(2) inform the contractor of its rights to judicial or administrative review as provided in this Chapter.

(d) Notice of Decision. A copy of the decision under Subsection (c) of this Section shall be mailed or otherwise furnished immediately to the contractor.

(e) Finality of Decision. The decision reached pursuant to Subsection (c) of this Section shall be final and conclusive, unless fraudulent, *or* the contractor commences an action in court in accordance with § 6978(c) of this Chapter.

(f) Failure to Render Timely Decision. If the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or the designee of one of these officers does not issue the written decision required under Subsection (c) of this Section within sixty (60) days after written request for a final decision, *or* within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

GGC § 6975.2(a)-(f) (1982) (emphasis added).

[25] Second, GGC § 6978(c) provided the waiver of sovereign immunity for breach of contract cases. Under the original Procurement Law provisions, the Superior Court was conferred jurisdiction for breach of contract suits seeking monetary damages. Guam Government Code § 6978(c) and (f) state in relevant part:

> (c) Actions Under Contracts or for Breach of Contract. The Superior Court shall have jurisdiction over an action between the Territory and a contractor, for any cause of action which arises under, or by virtue of, the contract, *whether the action is at law or in equity, whether the action is on the contract or for a breach of the contract, and whether the action is for monetary damages or declaratory, or other equitable relief*, but shall be subject to § 526 of the Code of Civil Procedure, and as it may be amended or re-codified from time to time.
>
> (f) All actions permitted by this Article shall be conducted as provided in the Government Claims Act.

GGC § 6978(c), (f) (1982) (emphasis added).

[26] Third, GGC § 6878.1(c) defined the time limitations for when a suit for breach of contract damages must be brought. Section 6878.1(c) provides:

> Actions Under Contracts or for Breach of Contract. Any action commenced under Section 6978(c) of this Chapter shall be commenced within *six months* of the date the claim arose, or within *six months* of the date claimant knew, or should have known, that a claim existed against the other party.

GGC § 6878.1(c) (1982).

[27] In 1986, the 18th Guam Legislature amended the Procurement Law and added a Procurement Appeals Board, which was again a modified version from a similar provision found in the Model Procurement Code. Guam Pub. L. 18-44 (Nov. 14, 1986). The provisions regarding the Procurement Appeals Board were originally codified in

GGC §§ 6983-6983.9 and are presently codified in Title 5 GCA §§ 5701-10 (1996). In addition, the 1986 amendments changed several provisions of the Procurement Law to allow the Procurement Appeals Board to function within the procurement process and significantly modified several of the provisions outlined above.[3]

[28] The first pertinent change is found in Title 5 GCA § 5480(c) (1996) (modified from GGC § 6878(c)), which no longer confers jurisdiction to the Superior Court for breach of contract cases seeking monetary relief as it originally did in the 16th Guam Legislature version. Section 5480(c) instead provides the following:

> In addition to other relief and remedies, the Superior Court shall have jurisdiction to grant injunctive relief in any action brought under Subsections (a), (b), or (c) of this Section.

Title 5 GCA § 5480(c) (1996).

[29] The second significant change is found in Title 5 GCA § 5481(c) (1996) (modified from GGC § 6878.1(c)), which changes the time limitations on when an action for a breach of contract suit can be brought. Section 5481(c) states in relevant part:

> Any action commenced under 5480(c) of this Chapter shall be commenced within twelve (12) months after the date of the Procurement Appeals Board decision.

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[3] In *Pacific Rock I*, we failed to recognize the magnitude of those changes made by the 18th Legislature. In this regard, our court is not alone as reflected in the latest version of the Guam Administrative Rules and Regulations, which do not comply with the current Procurement Law in all respects.

Title 5 GCA § 5481(c) (1996).

[30] The third major addition to the current Procurement Law is the existence of the Procurement Appeals Board, which added two important dimensions to contract or breach of contract claims. First, it added another review mechanism at the administrative level before a case could be brought to court. Second, it extended the claimant's time frame to bring a Title 5 GCA § 5427 (1996) case into court from six months starting from the time the Chief Procurement Officer renders a decision (under the original Procurement Law) to twelve months from the time the Procurement Appeals Board renders a decision.

[31] The creation of the Procurement Appeals Board, however, does not aid claimants such as Pacific Rock who are seeking monetary damages under a breach of contract theory. Title 5 GCA § 5705, which outlines the jurisdiction of the Procurement Appeals Board provides in pertinent part:

> The Board shall have the power to review and determine de novo any matter properly submitted to it. *The Board shall not have jurisdiction over disputes having to do with money owed to or by the government of Guam.*

Title 5 GCA § 5705 (1996) (emphasis added).

[32] As reflected above, the Procurement Appeals Board has no jurisdiction over disputes such as the present, which involve money owed to or by the Government of Guam. The Procurement Appeals Board's lack of jurisdiction in this area is consistent with the 18th Guam Legislature's modification of GGC § 6878(c) (presently codified as Title 5 GCA § 5480(c)) which originally conferred jurisdiction to the Superior Court in breach of contract cases

seeking monetary relief. The Procurement Appeals Board's lack of jurisdiction and the legislature's latest modification do not render the Procurement Law wholly inapplicable to the present case however, in view of the legislature's retention of Title 5 GCA §§ 5427(a)-(f) (originally codified as GGC §§ 6975.2(a)-(f)).[4] As aforementioned above, this specific section of the Procurement Law outlines the Procurement Law's applicability and the Chief Procurement Officer's authority in resolving contract and breach of contract controversies at the administrative level.[5]

[33] In sum, when viewed in totality, the current disposition of the Procurement Law is that it no longer confers a waiver of sovereign immunity for breach of contract cases for monetary relief. The Procurement Law remains applicable

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[4] Notwithstanding some minor modifications from its original enactment, 5 GCA §§ 5427(a)-(f) is essentially identical to GGC §§ 6975.2(a)-(f) as outlined above.

[5] The requirement of resolving the dispute at the administrative level provided for in the Procurement Act comport with the contracts signed by the parties in this case. Each of the four contracts contained a "Disputes Clause" which stated in pertinent part:

> Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer whose decision shall be final and conclusive upon the parties thereto. In the meantime the Contractor shall diligently proceed with the work as directed.

Plaintiff-Appellee's Supplemental Excerpts of Record (Trial Exhibits A, B, C, D). In addition, paragraph IX(2)(a) of the general conditions of the contracts provided in relevant part:

> Except as otherwise provided in this contract, any disputes arising under this contract shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive.

Defendant-Appellant's Excerpts of Record, Tab 26 (Exhibit 2).

to such cases, however, through 5 GCA §§ 5427(a)-(f), which in effect, provide the last administrative remedy that a claimant must exhaust before pursuing legal recourse.

2. Claims Act

[34] Because we find that the Procurement Law, though applicable at the administrative level pursuant to 5 GCA §§ 5427(a)-(f), does not confer jurisdiction to courts for breach of contract suits seeking monetary relief, we hold that the statute of limitations under the Procurement Law was not the proper statute to apply in this case. This does not end our analysis, however, we next examine the other proposed statute, the Claims Act. Although the trial court applied the Claims Act in the instant case, the focus of the trial court's opinion was determining whether or not Pacific Rock complied with the procedures under the Claims Act and not necessarily discussing the basis for their choice of the Claims Act as the applicable statute. Ultimately, the trial court found that Pacific Rock "substantially complied with" the Claims Act's procedures. Record on Appeal, Tab 72, p. 65 (Decision and Order Feb. 26, 1997). We hold that the trial court was correct in applying the Claims Act as the proper statute in its determination of whether Pacific Rock filed its suit within the statute of limitations, however, we also point out below, the specific provision that confers jurisdiction to the courts in breach of contract cases praying for monetary damages.

[35] The waiver of sovereign immunity for breach of contract suits against the Government of Guam and its

instrumentalities is found in Title 5 GCA § 6105 (1993), which provides in pertinent part:

> Pursuant to Section 3 of the Organic Act of Guam, the Government of Guam hereby waives immunity from suit, but only as hereinafter provided:
>
> > (a) for *all expenses incurred in reliance upon a contract to which the Government of Guam is a party*, but if the contract has been substantially completed, expectation damages may be awarded;

Title 5 GCA § 6105(a) (1993) (emphasis added). Unlike the current Procurement Law provisions, 5 GCA § 6105 provides the proper waiver of sovereign immunity for breach of contract suits praying for monetary relief. Moreover, the statute provides for both reliance and expectation damages awards.

[36] In *Pacific Rock I*, we departed from the *Ciesiolka v. San Nicolas* line of cases that made strict compliance with the Claims Act a jurisdictional prerequisite to maintaining suit against the government. *Ciesiolka v. San Nicolas*, Civ. No. CV-90-00076A, 1991 WL 336902, at * 3 (D. Guam App. Div. June 11, 1991). In accord with our current holding that the statute of limitations found in the Claims Act is the proper time limitations to apply in the present case, we return to the policy adopted by the 9th Circuit. The pragmatical effect of this holding is that claimants, such as Pacific Rock, whose claims are not conferred a waiver of sovereign immunity under the Procurement Law, are required to file a government claim with the Attorney

General before filing suit in court as mandated by 5 GCA §§ 6106, 6201-13.[6]

[37] We acknowledge Pacific Rock's concern and our previous apprehension in *Pacific Rock I*, where exhaustion of remedies under the Procurement Law and the filing of a claim with the Attorney General's Office may result in dual administrative review, at the Chief Procurement Officer level and at the Attorney General level. The rationale for our current disposition in this matter is two-fold. First, as previously outlined in the Procurement Law discussion, the 18th Guam Legislature not only removed the waiver of sovereign immunity under the Procurement Law for breach of contract cases seeking monetary damages, but also, specifically did not allow the Procurement Appeals Board to hear cases that involve money owed to and by the Government of Guam. Consequently, notwithstanding the current non-existence of the Procurement Appeals Board, had the Board existed, cases within the Procurement Appeals Board's jurisdiction would have received dual administrative review as well, at the Chief Procurement Officer level and the Procurement Appeals Board level before the case is moved to court. Second, the possibility of additional review (which increases the chances of settlement before the case enters the court system) is consistent with the overarching policy of sovereign immunity and that is to protect the government from unnecessary suits. *See Rustin v. Dist. of Columbia*, 491

[6] To eliminate any discrepancies, we confine our opinion to suits such as the present, wherein the Procurement Law does not confer a waiver of sovereign immunity. In suits that the Procurement Law provides for a comprehensive remedial scheme both administratively and legally, then the Procurement Law controls and to that extent *Pacific Rock I* remains good law.

A.2d 496, 501 n. 8 (D.C.1985) (citations omitted) ("The very purpose of the doctrine of sovereign immunity is to protect the government from having to spend significant amounts of time litigating the merits of its policy decisions."). The commentary found in Title 5 GCA § 6206 (1993) entitled *Settlement of Claim Before Action* supports this proposition and states in relevant part:

> Former law, with a short exception, provided that the Attorney General could approve settlements only if they were under $3,000. This section retains the limit of $3,000 for the Attorney General or Claims Officer acting alone, but permits greater settlements with the approval of the Governor, in the case of line agencies, and the Board or chief officer, Attorney General and Governor in the case of autonomous agencies. This should encourage settlements before court suits, but keep the policy makers aware of the settlement and permit them to bring other policy considerations into the larger settlements. *We should not encourage suits where settlement is possible.*

Title 5 GCA § 6206 cmt. (1993) (emphasis added).

B. When did Pacific Rock's Claim Arise?[7]

[38] The next issue that our court must resolve is when Pacific Rock's claim against DOE arose. At first glean, the issue appears straightforward, however, the analytical scheme for resolving it begins with the recognition of the interplay between both the Procurement Law and the Claims Act outlined above. Moreover, the resolution of this issue ultimately controls whether or not Pacific Rock met the statute of limitations for their present suit. For reasons set forth below, we affirm the trial court's finding that Pacific Rock's claim arose on July 20, 1993, which represents the date of the final decision under 5 GCA § 5427.

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[7] We disagree with the dissent's intimation that the issue of when the claim arose was not properly raised in the Petition for Rehearing. *See infra* (concurring and dissenting opinion of BENSON, J.). Notwithstanding the issue's significance in the original appeal, in this rehearing, both parties extensively discussed the issue in their briefs and during oral arguments.

Alternatively, even if the issue was not properly raised, if in review of our prior opinion, we discover an error, the court can *sua sponte* grant rehearing on the issue. In this regard, we follow the procedural framework of *Clark Pipe & Supply Co., Inc. v. Associates Commercial Corp.*, 893 F.2d 693 (5th Cir.1990). In *Clark Pipe*, an issue was not raised by the Petitioner, however, the court, *sua sponte*, granted rehearing on that issue in conjunction with the issues that were properly raised reasoning: "Our review of our prior opinion . . . convinces us that our holding with respect to valuation of the collateral is erroneous and should be corrected in order to avoid any precedential effect it may have on this point." *Id.* at 595 n. 1.

1. Pacific Rock's Claim Arose When it Exhausted its Administrative Remedies Afforded to it by the Procurement Law.

[39] In the instant case, Pacific Rock brought a breach of contract suit against DOE for monetary damages.[8] As illustrated above, breach of contract claims seeking monetary damages for contracts procured under the Procurement Law are distinct from other contract claims that arise under the Procurement Law, in that there is no waiver of sovereign immunity, however, that does not mean that this case is wholly removed from the Procurement Law. The 18th Guam Legislature's retention of 5 GCA §§ 5427(a)-(f) in view of all the major changes that occurred in the Procurement Law during that period, reflects the Guam Legislature's desire that breach of contract disputes, regardless of the remedy sought, be first resolved at the Chief Procurement Officer's level. Because 5 GCA § 5427 sets forth the final administrative measure that a contractor such as Pacific Rock must undertake under the Procurement Law before seeking further remedy, we find 5 GCA § 5427(f) entitled *Failure to Render Timely Decision* germane in the court's analysis of when a claim arises. Title 5 GCA § 5427(f) provides:

> If the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or the designee of one of these officers does not

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[8] Pacific Rock contends that the disputed and undisputed portions of its breach of contract suit are distinct and that even if the court rules that the suit was brought beyond the statute of limitations, the undisputed portion should nonetheless be awarded to them. We find Pacific Rock's contention unwarranted. In a breach of contract claim, the Plaintiff cannot separate the undisputed portion from the disputed portion for they are part of the whole case.

> issue the written decision required under Subsection (c) of this Section within sixty (60) days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

5 GCA § 5427(f).

[40] Title 5 GCA § 5427(f) establishes a scheme as to when a final decision should be rendered. In our reading of the statute, we see three possible scenarios that claimants may face during their dispute resolution with the Chief Procurement Officer. The first scenario is that a claimant submits a written request for a final decision, which should be rendered within sixty days by the Chief Procurement Officer. The second instance is that the parties agree to prolong the final decision beyond the sixty days which is allowable under the "within such longer period as may be agreed upon by the parties" clause of the provision. Title 5 GCA § 5427(f) (1996). The third situation is that there is neither a written request for a final decision within sixty days submitted nor an agreement between the parties (through words or conduct) to prolong the final decision beyond the sixty days and therefore, a final decision should still be rendered within the sixty days. Under scenarios one and three, the matter becomes a direct application of the sixty days formula mandated by the statute, however, under the second instance, the determination of when the Chief Procurement Officer or his representative renders a final decision as a result of all the negotiations becomes a factual issue that a court is compelled to examine. We find that the case between Pacific Rock and DOE falls under this second scenario.

2. The Issue of When a Final Decision was Given is a Question of Fact.

[41] In *Pacific Rock I*, we failed to identify the proper standard of review in our examination of this specific factual issue regarding the date of the final decision under 5 GCA § 5427(f). "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . . " *Yang v. Hong*, 1998 Guam 9, ¶ 4 (citing to Guam R. Civ. P. 52(a) and *Coffey v. Gov't of Guam*, 1997 Guam 14, ¶ 6). "Factual determinations are reviewed for clear error." *Yang*, 1998 Guam 9 at ¶ 4 (citing to *Guam v. Chargualaf*, Crim. No. 88-00068A, 1989 WL 265040, at *2 (D. Guam App. Div. Sept. 26, 1989)).

[42] Here, the trial court concluded that Pacific Rock's claim against DOE arose on July 20, 1993. Record on Appeal, Tab 72, p. 68 (Decision and Order Feb. 26, 1997). The trial court based its finding on the offer and counter-offer activities that occurred between the parties after the substantial completion of the project on August 16, 1991. *See id.* at 66. It further found that notwithstanding DOE's unfavorable treatment of Pacific Rock's demand, "it [was] clear that no official denial of [Pacific Rock's] claims had been made" until July 20, 1993. *Id.* at 66, 68.

[43] From our examination of the record, especially focusing on the documented correspondences between the parties after the substantial completion of the project, we hold that the trial court's finding of fact regarding when Pacific Rock's claim arose was not clearly erroneous and therefore, affirm it. "A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake." *Yang*, 1998 Guam 9, at ¶ 7.

[44] The project was substantially completed on August 16, 1991; this day also represented the day of final inspection and when the final payment was due. Throughout the duration of the project, several disputes surfaced regarding the various modifications from the original plan. When the project formally ended on August 16, 1991, further negotiations regarding those modifications and payment of those modifications not only continued, but discussions about the final payment remaining on the contract commenced.

[45] Although Pacific Rock demanded payment of $639,607.60 to DOE on December 28, 1992, the negotiations did not cease. On February 2, 1993 and supplemented by another letter on February 8, 1993, Quitugua made Pacific Rock an offer of $272,875.05. Quitugua's February 8, 1993 letter contained the following excerpt:

> The offer of $272,875.05 is firm and non-negotiable. If this is not acceptable, Mr. Swegler is free to pursue any available remedies.

Defendant-Appellant's Excerpts of Record, tab 19 (trial exhibit Y).

[46] The trial court did not construe the above as a final rejection of Pacific Rock's demand because it did not contain the required language that Pacific Rock is free to seek judicial review in Superior Court. Record on Appeal, Tab 72, p. 67 (Decision and Order, Feb. 26, 1997). Additionally, in response to Pacific Rock's request for further negotiations on February 10, 1993, Quitugua welcomed the opportunity for further negotiations as reflected in the following excerpts of his February 24, 1993 response:

> In response to your request to further negotiate the matter of the amounts due to Pacific Rock we

> are prepared to meet with you and Mr. Swegler to completely and finally resolve this matter.

I look forward to working with you toward resolving this matter once and for all. Plaintiff-Appellee's Supplemental Record on Appeal (Exhibit D-55).

[47] In addition to the above, another letter sent by Baldeviso, the Contracting Officer's representative, demonstrate the parties ongoing resolution of the dispute. In that June 16, 1993 nine page letter, Baldeviso addressed each of the various packages under the project, gave a brief description of the claims that Pacific Rock had, and noted whether or not the claims were approved or disapproved. At the end of the letter, Baldeviso stated:

> We look forward that the above information will help settle disputes and eventually close these project in due time.

Plaintiff-Appellee's Supplemental Excerpts of Record (Trial Exhibit 41-9).

[48] It was not until the July 20, 1993 letter from the Attorney General's office had Pacific Rock been notified that its claims have been rejected and that the Government's final offer was $277,506.19. This letter, which the trial court construed to be the final denial of Plaintiff's request, is significant because it attached Baldeviso's final assessment of the project. Moreover, this letter contained a larger amount than the one previously offered by Quitugua and established Pacific Rock's claim against DOE. *See Franconia Assocs. v. United States*, 240 F.3d 1358, 1364 (Fed. Cir. 2001) ("A claim against the United States first accrues when the government's liability is determined."); *see also Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988); *see also Wrona v. United States*, 40 Fed. Cl. 784,

787-88 (1998); *see also Brighton Village Assocs. v. United States*, 52 F.3d 1056, 1060 (Fed. Cir. 1995).

[49] In addition to 5 GCA § 5427, which authorizes the Contracting Officer to resolve matters that arise in procurement contracts, the general conditions of the contracts contained a disputes provision that stated, "any disputes arising under this contract shall be decided by the Contracting Officer." Defendant Appellant's Excerpts of Record, Tab 26 (Exhibit 2). Furthermore, even during the construction period, the contract mandated that not only are disputes to be decided by the Contracting Officer, but also, "[i]n the meantime the Contractor shall diligently proceed with the work as directed." Plaintiff-Appellee's Supplemental Excerpts of Record (Exhibits A, B, C, D). It was therefore fair and reasonable for the parties to continually negotiate in the manner that they did and for as long as they did. Had Pacific Rock chosen to immediately file suit in court before resolving this matter in accordance to 5 GCA § 5427 and their contract per the disputes provisions in the general conditions of the contracts, they would have failed to exhaust their administrative remedies and would not have been able to maintain their suit. *See Cannon v. United States*, 146 F. Supp. 827, 829 (Ct. Cl. 1956). ("A cause of action of whatever nature can accrue only at the time that a suit may be maintained thereon, and from that date forward the applicable statute of limitations begins to run."). We therefore affirm the trial court's finding of July 20, 1993 as the date when Pacific Rock's claim against DOE arose as it effectively represented the date when Pacific Rock was rendered a final decision under 5 GCA § 5427(f).

C. Did Pacific Rock's Claim against DOE fall within the Statute of Limitations?

[50] At the heart of this case is the determination of "Whether Pacific Rock's breach of contract claim seeking monetary damages was filed within the statute of limitations?" We hold that Pacific Rock's claim was filed within the statute of limitations. Our holding here is grounded from our previous resolution of the two preliminary queries. First, the proper statute of limitations applicable in a breach of contract suit involving money owed to or by the Government of Guam is found in the Claims Act. Second, Pacific Rock's claim arose when it exhausted its administrative remedies afforded to it by the Procurement Law pursuant to 5 GCA § 5427.

[51] The statute of limitations under the Claims Act is found on Title 5 GCA § 6106 (1993) and provides:

> Limitations on Actions and Filing.
>
> (a) All claims under this Act must be filed within 18 months from the date the claim arose, but any claims timely filed under the predecessor of this Act shall be considered to have been timely filed under this Chapter.
>
> (b) Every action filed under this Chapter shall be barred unless commenced within 18 months from the time the notice that the claim was rejected was served as provided in Article 2 of this Chapter, or within 24 months after the claim was filed in cases where the government does not reject the claim.

Title 5 GCA § 6106(a)-(b) (1993). Pursuant to 5 GCA § 6106(a), a claimant must file a claim "within 18 months from the date the claim arose." 5 GCA § 6106(a). As 5 GCA

§ 6106(a)-(b) provide and the comment to this specific provision explains, the government has six months to render a decision on this claim. A claimant can only file a suit in court within eighteen months after the government rejects its claim during those six months or within twenty-four months after the original filing of that claim if the claim is not rejected during those six months, whichever comes first.

[52] As we determined above, Pacific Rock's claim arose on July 20, 1993. Pacific Rock had eighteen months from that time to file a claim. It filed a government claim with the Guam Attorney General's Office for both the final payment and compensation for the additional work against DOE on November 4, 1994. This was sixteen months from the time the claim arose and therefore within the eighteen-month limit of 5 GCA § 6106(c). Two weeks later on November 16, 1994, Pacific Rock filed its suit in the Superior Court. An examination of the record does not reveal that the Attorney General responded to Pacific Rock's November 4, 1994 government claim. Consequently, Pacific Rock should have waited six months from the time they filed their claim on November 4, 1994 before filing suit in Superior Court. On September 18, 1995, however, Pacific Rock filed a Supplemental Complaint in Superior Court, which, in effect, served as a cure to their premature filing on November 16, 1994. We, therefore, hold that Pacific Rock's claim was filed within the statute of limitations. Accordingly, the trial court had jurisdiction to hear Pacific Rock's case against DOE.

IV.

[53] Our opinion is restricted to breach of contract cases for contracts procured under the Procurement Law, which involve money owed to or by the Government of Guam. For other types of contracts procured under the Procurement Law and whose claimants have been afforded a comprehensive remedial scheme both administratively and legally under the provisions, we affirm our holding in *Pacific Rock I*, which states that the Procurement Law controls those types of actions against the Government of Guam as intended in the Procurement Law. In the present case, however, the Procurement Law served as the final administrative remedy that Pacific Rock had to pursue before going to the Claims Act; and whose exhaustion of such administrative remedy effectively commenced the running of the statute of limitations under the Claims Act. We hold that Pacific Rock's claim was filed within the statute of limitations provided for in the Claims Act and that the trial court had jurisdiction to decide the merits of the case. The trial court's decision is **AFFIRMED**. Our holding in *Pacific Rock I* is modified to the extent that it is inconsistent with our holding today.

John A. Manglona	**F. Philip Carbullido**
JOHN A. MANGLONA	F. PHILIP CARBULLIDO
Designated Justice	Chief Justice (Acting)

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam. Dated at Hagatna, Guam.

NOV 07 2001

Imelda B. Duenas [stamped]
Notary Clerk, Supreme Court of Guam

BENSON, J.: CONCURRING and DISSENTING

[54] I concur with the court in its reasoning and in its holding that in breach of contract cases seeking monetary damages against the Government of Guam, the Procurement Law serves as the final administrative remedy that is a prerequisite to filing a claim pursuant to the Claims Act.

[55] I dissent from the holding that Pacific Rock's claim arose on July 20, 1993, the trial court's finding of fact, not on December 28, 1992 as held in *Pacific Rock I.* The court states that the issue was raised in the Petition for Rehearing. I do not agree.

[56] In its Petition for Rehearing, Pacific Rock failed to meet the requirements of Rule 31 of this Court's Rules of Appellate Procedure to "state with particularity the points of law or fact . . . the Court has overlooked or misapprehended." Guam R. App. P. 31(a). The court's opinion sets out the four issues presented by Pacific Rock. That *Pacific Rock I* erred in holding the date it did is not raised. Nor does the Petition for Rehearing raise the issue of the standard of review for factual findings (which would have gotten to the problem). The memorandum supporting the Petition for Rehearing does not discuss either the date found by the trial court, the date held in *Pacific Rock I*, or the standard of review.

[57] The Department of Education's response to the Petition for Rehearing mentions December 28, 1992 only to point out that even if the eighteen months in the

Government Claims Act were the proper statute of limitations to use, Pacific Rock is still out of time. In its reply brief, Pacific Rock discusses at length what it sees as the proper date (July 20, 1993), and quotes from its brief on appeal. These two circumstances do not correct that failure of Pacific Rock to "state with particularity" the issue.

[58] The court also states that it is entitled to address "DOE's points of argument in the original appeal." No authority is cited, and I know of none.

[59] I believe, therefore, that the issue of the date on which the claim arose is not before us.

[60] On its own motion, the court could have granted a rehearing on the issue of whether *Pacific Rock I* properly overruled the trial court's finding of fact. *Clark Pipe and Supply Co., Inc. v. Associates Commercial Corporation*, 893 F.2d 693, 695 n. 1 (5th Cir. 1990) (granting a rehearing on the issue requested and on a second issue *sua sponte*. "Our review of our prior opinion, however, convinces us that our holding with respect to valuation of the collateral is erroneous and should be corrected in order to avoid any precedential effect it may have on this point. We therefore, sua sponte, grant REHEARING on that issue as well." *Id.*).

Richard H. Benson
RICHARD H. BENSON
Justice *Pro Tempore*

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Attorney for Petitioner

IN THE SUPERIOR COURT OF GUAM

PACIFIC ROCK CORPORATION, Petitioner, v. LOURDES M. PEREZ, in her official capacity as the Director of Administration, Government of Guam, Respondent.	SPECIAL PROCEEDINGS CASE NO. SP0218-02 **JUDGMENT**

(Filed Mar. 28, 2003)

This action came for hearing on January 10, 2003, upon Petitioner's Application for Writ of Mandamus, and again on February 14, 2003, upon Petitioner's Second Petition for Writ of Mandamus, Honorable Joaquin V. E. Manibusan, Jr., Judge, presiding, and the issues having been heard and decision thereon duly rendered;

IT IS ORDERED AND ADJUDGED that on Petitioner's first application, the writ shall issue and the

Director of Administration, Government of Guam, shall pay Petitioner from the Government Claims Fund post-judgment interest at the rate of six percent (6%) per annum accruing on the judgment in Guam Superior Court Case No. CV1668-94; and

IT IS FURTHER ORDERED AND ADJUDGED that on Petitioner's second application, the writ shall issue and the Director of Administration, Government of Guam, shall pay Petitioner from funds appropriated into the Government Claims Fund existing as of February 14, 2003, and with first priority thereafter, the principal amount of $526,602.04 on the Judgment in Guam Superior Court Case No. CV1668-94; PROVIDED, however, that the Government is entitled to credits on such judgment for all amounts credited by the Government on promissory notes issued to "Pacific Rock Corporation or bearer" for taxes or other obligations due to the Government of Guam, pursuant to 5 GCA §22415.

Dated: MAR 28 2003.

Original Signed By:
HON. JOAQUIN V.E. MANIBUSAN, JR.
HON. JOAQUIN V.E. MANIBUSAN, JR.
Judge, Superior Court of Guam

APPROVED AS TO FORM:

ATTORNEY GENERAL OF GUAM

By: /s/ Eric A. Heisel
ERIC A. HEISEL
ASSISTANT ATTORNEY GENERAL

IN THE SUPREME COURT OF GUAM

PACIFIC ROCK CORPORATION Plaintiff-Appellee, vs. **DEPARTMENT OF EDUCATION**, a department of the Executive Branch of the government of Guam, an unincorporated Territory of the United States of America, Defendant-Appellant.	Supreme Court Case No. CVA98-003 Superior Court Case No. CV0668-94 **MANDATE** (Filed Jan. 28, 2002)

APPEAL from the Superior Court of Guam.

THIS CAUSE came before this court on September 21, 2001

ON CONSIDERATION THEREOF, it is now hereby ordered and adjudged by this court that this appeal from the Superior Court of Guam is **AFFIRMED**.

Dated this 28th day of January, 2002